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9
PRACTICE REPORTS

IN THE

S U P R E M E C O U R T

AND

C O U R T O F A P P E A L S

OF THE

S T A T E O F N E W - Y O R K .

B Y N A T H A N H O W A R D , J U N . ,

C O U N S E L L O R A T L A W , N E W - Y O R K .

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PRACTICE REPORTS.

SUPREME COURT.

DORLON agt. LEWIS.

On the trial of a cause, a *referee* takes the place of a *jury* as well as of the court. His decision upon questions of fact, like that of a jury, is, as a general rule, conclusive.

If, therefore, it appears that the report of a referee upon questions of fact has been, even in the slightest degree, affected by any influence exercised by the successful party, it will be set aside for irregularity. (*See Gale agt. Gwinits, 4 How. Pr. R. 253, to the same point.*)

A referee, when a cause is entrusted to him, should not only avoid all improper influences, but even "the appearance of evil." And whether satisfied with his decision or not, *no one* should be left to question its entire *fairness*.

Albany Special Term, October, 1851. Motion to set aside report of referee and subsequent proceedings for irregularity.

The action was brought to recover certain bills of costs, alleged to have been due from the defendant to the plaintiff, as the assignee thereof. Judgment having been perfected in the action, by default, an order was made, in September, 1849, upon the application of the defendant, so far opening the judgment as to allow the defendant to put in an answer setting up the payment of \$50 by the defendant to the assignor, on the 5th of June, 1849, in settlement of the suit.

In pursuance of this order, an answer was put in, to which there was a reply by the plaintiff, and, subsequently, the issue thus joined was duly referred to a single referee, to hear and determine the same. After numerous hearings and the examination of a great number of witnesses, the referee, on the 16th of August, 1851, made a report in favor of the plaintiff,

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upon which report, on the 7th of October following, judgment was perfected for \$351,41.

It is stated in the affidavits upon which this motion was founded, that after the testimony had been closed, and the case finally submitted, the referee prepared a written opinion, in which he decided the question before him in favor of the defendant; and that he gave such opinion, or a copy thereof to the assignor of the demand, who was the plaintiff's attorney; that, upon receiving the opinion, he sought and obtained an interview with the referee, at which interview, the merits, evidence, and proceedings in this action were talked over and discussed; and that, by rearguing the case with the referee, and commenting upon the evidence, and repeating the *story* which he had himself told as a witness; and by representing that the impeachment of himself as a witness was the result of malice, and that by reporting against the plaintiff, the referee would find him guilty of perjury; and by asserting, and reasserting his honesty and good faith; and by force of pleading with and persuading the referee, he induced him to change his opinion, and make his report in favor of the plaintiff. It is also stated that the attorney, as a condition upon which the report should be made in his favor, pledged himself that no judgment should ever be entered upon the report, or other proceedings had thereon.

An affidavit of the referee was read in defence of the motion, in which he states, that the issue on the part of the plaintiff was mainly sustained by the testimony of the assignor; and that entertaining the opinion that a young man like him should avoid offering himself as a witness, under the circumstances in which he was placed in this cause, and while investigating it with a view to its decision, he did prepare an opinion adverse to the plaintiff and gave the same to the attorney, in the hope that, through the alarm it would create, he might be induced to resolve that he would not again offer himself as a witness for a party under such or similar circumstances, and that in this way a permanent amendment might be effected; that he had never, in fact, come to the conclusion to decide the cause in accord-

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ance with that opinion, and never stated to the defendant's attorney, as was alleged, that he had come to that conclusion, but that he stated to the defendant's attorney why he had given the opinion to the plaintiff's attorney.

The referee further stated in his affidavit, that as there was much testimony on each side, and no small amount of conflicting testimony, and, as the cause had been prosecuted and defended at considerable expense, and the point at issue was of such a character as that he felt that he might do injustice to one of the parties by his decision, he had made some efforts to get the parties to a settlement, but could not succeed in effecting it; that on one occasion, when the attorney was in his office, he asked him what he would do with the report if he should receive it; and that he replied, in substance, that he only sought to have his character sustained and vindicated—that he cared nothing about the money, and, if he got a report, he should not file it or serve a copy on the opposing party, but that he would discharge the judgment and thus have the matter finally settled; that, when he subsequently gave him the report, it was not under a pledge that he would not proceed under it, but he did suppose that he would not proceed upon the report, and that he would cancel the judgment.

The attorney states in his affidavit that he took the opinion which the referee handed him, as a kind of *Pickwickian* review of the case, and not as a decision either way. When called upon by the defendant's counsel for the purpose of obtaining the opinion, or a copy of it, stated that the opinion was in the hands of a lawyer in Albany, and he promised to furnish a copy to the defendant's attorney: but it was never done.

W. C. BENTON, *for Motion.*

J. K. PORTER, *Opposed.*

HARRIS, Justice. A referee takes the place of a jury as well as of the court. His decision upon questions of fact, like that of a jury, is, as a general rule, conclusive. Whenever there is any, even the slightest reason to suspect that the verdict of a jury has been affected by any influence exercised by the suc-

cessful party, it is set aside. Courts have always guarded with the most jealous watchfulness the right of litigants to have the unbiased judgment of the jury upon the evidence openly produced before them. Whenever it has been seen that, by any means or influence beyond what has transpired upon the trial, and in the presence of the parties, the minds of the jury may have been operated upon with reference to their verdict, it has been deemed sufficient ground for granting a new trial. See *Graham's Practice*, 813, 628, Gale agt. Gwinits, (4 How. 253,) and cases there cited.

The reasons which have led the court to be thus careful in preserving the integrity of the jury-box, apply, I think, with great, if not equal, force to the decisions of questions of fact by a referee. Such decisions having the same legal effect as a verdict, the parties when they submit their rights to this kind of tribunal should feel that they have the same guarantee against any improper influence as they would have had, if the questions had been left to the decision of a jury. An error of the referee upon a matter of fact, is not the less fatal to the rights of the party, because, besides acting in the place of a jury, he also decides questions of law.

In Gale agt. Gwinits, above cited, Mr. Justice PAIGE had this question before him, and came to the conclusion, although doubtingly, as he says, that the same rule ought to be applied to referees as to jurors. It is a question of some importance, especially in the present state of the practice, where so large a proportion of the issues of fact joined in our courts are tried in this manner, and I have given it some reflection. I have also taken the liberty of conferring with my brother PARKER on the subject, and we both concur in the views expressed by Mr. Justice PAIGE. He held that where a referee, in the absence, and without the consent of the opposite party, received explanations from the witnesses of one of the parties, it was sufficient ground for setting aside the report. If the same principle be applied to this case, the report cannot stand.

The referee admits, in his affidavit, that he had repeated conversations with the plaintiff's attorney in the absence of the

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defendant's attorney, and so also with the defendant's attorney in the absence of the plaintiff's attorney, in relation to the questions pending before him; but he says that nothing in these conversations, to his knowledge or belief, had any effect upon his mind, or led him to any conclusions at which he would not have arrived had no such conversations been had. This I believe. The referee is a man of the most unquestionable uprightness. None sooner than he would have spurned an attempt improperly to influence his decision. And yet it cannot be denied, that, in a case like this, where the attorney had so deep an interest in the result,—where the case, on the part of the plaintiff, depended, as the referee himself says, upon the testimony of the attorney, and the decision was regarded as deeply affecting the character of the witness—it would have been far more prudent to have avoided all conversation with the parties, or their attorneys, on the subject, until the decision had been made. A referee, under such circumstances, owes it to himself, not only to avoid all improper influences, but even “the appearance of evil.” Whether satisfied with the decision or not, no one should be left, for a moment, to question its *fairness*.

Again, it must be admitted that the referee stepped entirely aside from the line of his duty, when he allowed himself, before he had decided the case, to prepare an opinion adverse to the plaintiff, not for the purpose of deciding the case in accordance with such opinion, but, as he says, with a view to its effect upon the witness himself. The motive may have been creditable to the heart of the referee, but I think the mode of its execution was objectionable.

It is charged in the moving papers, that upon receiving the opinion of the referee, the plaintiff's attorney sought an interview with the referee and then persuaded him to change his opinion and make a report for the plaintiff. That he, in fact, had such an interview with the referee is not denied. Nor is it denied, that he endeavored to persuade the referee to make a report for the plaintiff, or that he presented the arguments and considerations set forth in the defendant's affidavit. All

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that is denied is, that these arguments and considerations had the intended effect upon the mind of the referee. It seems, however, that the referee *did* inquire of the plaintiff's attorney what he would do with the report if he should obtain it, and that he replied that he only sought to sustain his own character, and, if he got a report, he would not use it, but would discharge the judgment. The referee says he did not give him the report upon any such pledge or agreement, yet he did suppose that the plaintiff's attorney would not proceed upon the report, and that he would cancel the judgment. It was an unusual inquiry for a referee to make, and the assurance given by the attorney was equally unusual. It may have had no influence upon the mind of the referee. He thinks it did not. Whether it did or not, perhaps the referee himself cannot be entirely sure. At any rate, in a case where, as the referee says, there was much testimony on either side, and a large amount of this was conflicting, such a consideration ought not to have been presented to the mind of the referee. It may have had its effect, without his being conscious of it. Such a thing is at least possible, and that upon the principle already stated is enough to justify the court in setting aside the report.

The motion must, therefore, be granted.

The order of reference, also, must be vacated, and a new trial had at the circuit. The costs upon the reference and the costs of this motion should abide the event of the suit.

SUPREME COURT.

REYNOLDS agt.. THE CHAMPLAIN TRANSPORTATION CO.

On a motion to set aside the verdict of a jury for misconduct on the part of the plaintiff, the affidavits of the jurors may be received to show such improper conduct, though they could not be to show misconduct or irregularity on their own part.

The least intermeddling or improper interference with the jury, or any of them, by a party, during the trial, will vitiate the verdict. (*This agrees with the principle as applied to a referee in the next preceding case of Dorlon agt. Lewis.*)

Warren Special Term, May, 1853. Application to set aside the verdict obtained against the defendants in this action for misconduct of plaintiff with the jury, during the trial. The action was for damages for not carrying the plaintiff's fruit on defendant's boats, by reason of which it was spoiled and lost.

The trial was had at the October circuit, in Washington County, in 1852. It lasted two days, having been commenced on the 27th and finished on the 28th day of that month; and a verdict found for the plaintiff for \$154.

During the progress of the trial, and at times of recess, and during the night, the jury were allowed to separate, and go at large to their boarding houses, or elsewhere.

On the morning of the second day of the trial, and after the plaintiff had rested his cause, and before the going in of the court, three of the jurors who were empanelled to try the cause were in the bar-room of a public house in the village of Salem, with a number of other individuals there assembled. While there, a constable who was attending court at the time, and who was present in the bar-room, deposes, that the plaintiff addressed two of the jurors, and said in the presence and hearing of the jurors and the constable, that the defendants were a cut-throat corporation, that they had swindled the public, that they had defrauded him, the plaintiff, that he, plaintiff, had paid them thousands of dollars, that he delivered the fruit in controversy on said trial to the defendants, at their dock, to be carried on their

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boats, and that they refused to carry the same, and went off without it; and in consequence the fruit rotted or spoiled on his (plaintiff's) hands, and he lost several hundred dollars by reason thereof, and that defendants ought to stand it, or be compelled to suffer the loss. The constable remarked to the plaintiff in the presence and hearing of the jurymen that the persons he was addressing were jurymen, and asked plaintiff if he did not know it. Plaintiff immediately replied that he knew what he was about, and *requested the constable to mind his own business, and that what he had been saying to the jurors about his suit was true*; and he, plaintiff, afterward continued addressing the jurors in substance as before, detailing, as he plaintiff insisted, what were the facts of his case, and the mismanagement of the defendants in relation to his fruit. Neither of the jurors put any question to the plaintiff or made any remarks in relation to what he said. One of them left the room immediately after the plaintiff's reply to the constable, and another remained a short time after.

Justus Remington, one of the jurors who was empanelled in the cause, and joined in the verdict, deposes, that another juror (Mr. McMullen) and himself were in company in the bar-room at the time stated by the constable, and that the plaintiff addressed him and McMullen in relation to the matters on trial, and said, defendants were a lot of swindlers, that he, plaintiff, had paid them a great deal of money, that they had defrauded him by not carrying his fruit. He confirms substantially the statement of the constable; and adds that as soon as it occurred to him that there was any impropriety in listening to the plaintiff he left the room.

Another of the jurors (Mr. Warner) deposes on the part of defendants, that plaintiff was talking to the two jurymen, Remington and McMullen, in relation to the matters in controversy, and in relation to the damages he had sustained on account of the defendant's acts. He also confirms the constable in his statements, and testified that he left the room immediately after the reply of plaintiff to the constable; that the remarks of plaintiff were not called for by anything said at the time, and

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that neither of the jurors present put any questions or made any remarks.

One of the attorneys for defendants deposes that in a conversation with Remington on the 26th, and with Warner on the 21st of January, 1853, they each informed him of the facts as substantially stated by them in their affidavits.

In opposition to the motion the plaintiff makes an affidavit, in which he swears that he did not address the remarks mentioned in the defendants' affidavits to any of the jurors who tried the cause; that he came into the bar-room on the morning of the second day of the trial, when some persons, strangers to him, put to him questions concerning the trial, and that in answering them he stated substantially, as deposed in defendants' affidavits, that he did not know at the time that any of the persons present were jurors, as all the persons sworn on the jury were unknown to him, except one, who was not then present; that as he concluded his remarks, the constable, who made his affidavit, told him in an insolent manner, that he should not talk to jurors, and that on his replying that he was not talking to jurors, the constable answered that he should not talk in the hearing of jurors; that he, plaintiff, rejoined that he was not aware he was talking in the presence of jurors and would stop, and did stop, and that he did not tell the constable to mind his own business, and that he knew what he was about. The jurors, Remington and Warner, have made additional affidavits which were read by the plaintiff in opposition to the motion. Warner substantially deposes as he did in his first affidavit, except that he does not now remember what epithets the plaintiff made use of toward the defendants, nor what reply plaintiff made to the constable. He swears that the remarks were after the plaintiff had rested, and were a detail of what he had proved on the trial; that they had no influence upon his mind in rendering his verdict; that he was governed, in assenting to that, wholly by the evidence. Mr. Remington does not now remember all the remarks of the plaintiff, but that plaintiff said defendants ought to have carried his fruit, and that they were a set of cut-throats; that the remarks made no impression

upon his mind, and he rendered his verdict according to the evidence without reference to them. The other juror who was present swears, that he heard none of the remarks made by the plaintiff.

A case was made in the cause, and settled on the 22d, and a copy prepared and served on the 26th of February, 1858. The facts detailed in the affidavits were first communicated to defendants' attorney about the 21st of January, 1858; the case forms a part of the basis for the motion. It was first noticed for the Fulton Special Term, in April, 1858; and was postponed at request of plaintiff's counsel until this term. A special term was held at Elizabethtown on the first Monday in March.

JOSEPH POTTER, *for Plaintiff.*

GIBSON & DAVIS, *for Defendants.*

C. L. ALLEN, Justice. It is objected that the motion should have been noticed for the special term in March, and that it now comes too late.

I think the papers show a sufficient excuse for not making it at that term. The facts were not discovered until the 21st of January, 1858. The plaintiff desired to ground his motion partly upon the case as he had a right to do, which was not settled until the 22d of February following, too late to engross and prepare a copy with the other papers to serve in time for the first Monday in March, the time for holding the Essex Special Term. The motion was noticed for the next earliest day, at the special term in Fulton, and was postponed until this time, at the request of the plaintiff. Under these circumstances the defendants are not chargeable with laches.

2. This brings me to the merits of the motion. I have carefully looked at the papers, and into all the cases which have been cited, and which I can find, having a bearing upon the question presented. No impropriety, in my judgment, can be charged upon either of the jurors. They were in the bar-room casually during the recess of the court, availing themselves of the privilege of being at large, which had been

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accorded to them by the court, with the consent of the parties. They did not converse with the plaintiff, or put any questions to him whatever. They maintained a strict silence during the time he was making his remarks, and whatever impropriety there was in listening to these remarks, it seems they left the room as soon as the idea of such impropriety was suggested to their minds. No improper feeling or motive whatever is discoverable in either of them; and if the motion rested upon the ground of improper conduct on their part, it would at once be denied. Neither would their own affidavits be received for the purpose of establishing any such position, as it has been well and repeatedly settled, that the affidavit of a juror cannot be received to impeach the verdict, for mistake or error in respect to the merits, nor to prove irregularity or misconduct on his part or that of his fellows. *Clum agt. Smith*, (5 *Hill*, 560,) and cases cited, (4 *John. R.* 487.)

But the affidavits of the jurors may be received as well as others for the purpose of showing improper conduct on the part of the plaintiff; and the question is here, whether such misconduct has been shown on his part as ought to set aside the verdict in this case.

In the case of the *People agt. Douglass*, (4 *Cow.* 26,) a case of murder, the court granted a new trial, because two of the jurors separated from their fellows and went to their lodgings and ate cakes and drank spirituous liquors; and the court granted a new trial for that reason; but remarked, in the course of delivering their opinions, that in a civil suit it is perfectly clear that a separation of the jury without, and even contrary to the direction of the court, would not of itself be sufficient to set aside the verdict. In this case the jury separated by the consent of the parties, and the permission of the court, and their separation clearly forms no ground for interference with the verdict.

But while thus separated it was not proper for them to converse with any one, or to listen to any conversation addressed to them; and it was highly improper for the plaintiff to approach any of them, or to address any remarks to either or any

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of them in relation to the subject matter of the suit. It has been well remarked, that when in the course of a trial a juror has in any way come under the influence of the party who afterward has the verdict, that such verdict ought not to stand. *Wilson agt. Abrahams*, (1 *Hill*, 207.) But a trifling irregularity on the part of the jury, such as a juror leaving his seat, but having no conversation with any person in relation to the suit, will not vitiate the verdict, unless there is some reason to suppose that the party moving may have suffered by the misconduct of which he complains, (1 *Cow.* 221 ; 2 *ib.* 589 ; 3 *ib.* 355,) and so are the ancient cases.

In the case of *Smith agt. Thompson*, (1 *Cow.* 221,) the court decided that where two jurors, after the jury had retired to consider of their verdict, separated from their fellows, and were gone some hours, but returned and joined in the verdict, *there appearing to have been no probability of abuse*, they would not set aside their verdict. Many cases are collected in a note to that case—both English and American, the result of the conclusions of all which is substantially as in the case itself—one of them decidedly intimating that conversation with a juror, or in his presence, by the party in whose favor the verdict was rendered, would be sufficient to set it aside. In the case of *Horton agt. Horton*, (2 *Cow.* 589,) the court say, that although the mere separation of the jury, without their sanction, may be a contempt of court, yet it will not be sufficient to vitiate the verdict—but they remark, that if the slightest suspicion had appeared that the privilege had been abused to the injury of the party, the verdict should be set aside.

In *Knight agt. the Inhabitants of Freeport*, (13 *Mass.* 248,) a son-in-law of the plaintiff said to one of the jurors after empanelling, and before trial, that the cause was of great consequence to him, and that if it went against the plaintiff he should have to pay the costs, and that defending the suit was a spiteful thing on the part of the inhabitants of Freeport ; the court said, “Too much care and precaution cannot be used to preserve the purity of jury trials,” and the verdict was set aside.

The case of *Coster agt. Merrit* (3 *Brod. and Bingham*, 257,

reported in 7 C. L. 688) decides, that if the prevailing party has made communications to members of the jury reflecting upon the character of his adversary, the verdict will be set aside. In that case, it was sworn that handbills reflecting on the plaintiff's character had been distributed in court and shown to the jury on the day of trial. The court would not receive from the jury affidavits in contradiction, and granted a new trial against the defendant, although he denied all knowledge of the handbills. It was remarked that it might be of pernicious consequence to receive such affidavits in any case, or to assume that a jury had been unduly influenced.

The case of Oliver agt. The Trustees of First Presbyterian Church, &c., in Springfield, (5 Cow. 284,) is similar to the present in some respects. The jury, in that case, had procured a separation through artifice. Before they reassembled, some of them were seen in a bar-room, *where the cause was much talked of*. The court remarked, "That in cases where verdicts had been sustained, notwithstanding the separation of the jury, *there was no suspicion of abuse*, it appearing *affirmatively* that there was nothing that followed the separation which could be injurious to the party seeking to get rid of the verdict. But in that case, that *several of the jurors were found in a public bar-room, where the subject of the suit was much talked of in their presence*, and it is not pretended that they did not listen to the conversation." The court thought it enough that conversation was carried on, relative to the trial, (and it does not appear there by the parties,) in the presence of some of the jurors. It has been denied that if the prevailing party have made communications to members of the jury reflecting upon the character of his adversary, the verdict will be set aside. The case (in *Brod. and Bing.*) above cited, was for circulating handbills defaming the party, and the jurors swore they had not seen the handbill; yet the court set aside the verdict.— See *Graham on New Trials*, 47, 54.

I think the charge of reflecting on the character of the defendants is in this case clearly made out; two of the jurors, and Fisk, the constable, swear to it, and the plaintiff himself does

not fully deny it in his affidavit. He deposes, it is true, that he did not know he was talking in the presence of any of the jury; but three of the affidavits on the part of the defendants show, that he was told some of the jurors were present, and was cautioned against making his remarks in their presence, and that he replied, he knew his own business, and continued his remarks. The affidavits show, too, that he detailed the facts, or what he called the facts in his case, saying he had lost several hundred dollars by reason of the failure of defendants to carry his fruit. It is said that plaintiff said no more than what had been proven in court—that the remarks contained no new evidence—and that it is not to be presumed that jurors are to be influenced by what an interested plaintiff says, apart from the evidence given in the cause. The plaintiff did not confine himself to the evidence as detailed in court. He charged the defendants with the grossest crimes and misdemeanors, and in a manner calculated to prejudice the minds of his hearers. Besides, if it was strictly true that he did no more than to detail the evidence, it was improper to sum up his cause out of court, in a bar-room, to the jury or to any of them. A verdict has been set aside where a witness repeated over his evidence apart to the jury, and a repetition by the plaintiff is no better or purer. The court will not inquire whether the acts complained of influenced the verdict. In the case before cited (in *Brod. and Bing.*) the court would not permit affidavits of the jurors to be read, and would not assume that the minds of the jury had been influenced. And in the case of *Whitney agt. Whitman*, (5 *Mass.* 405,) the court refused to examine jurors to prove that they were not influenced by the paper which had been improperly put before them; they said it was impossible to decide in what manner their minds were influenced in forming their verdict.

In *Knight agt. Inhabitants of Freeport*, (17 *Mass.* 218,) the court say, “The attempt to influence the juror in this case was grossly improper, and ought to be discountenanced. It is not necessary to show that the mind of the juror was influenced by the attempt. Perhaps it is not in his power to say whether he was influenced or not. If he was, there is sufficient cause to

Reynolds agt. The Champlain Transportation Co.

set aside the verdict; and if he was not, and the party who has gained the verdict has a good cause, he will still be entitled to a verdict upon another trial. We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes. Too much care and precaution cannot be used to preserve the purity of jury trials, and every one ought to know that for any, *even the least* intermeddling with jurors, a verdict will always be set aside."

If the plaintiff has a good cause of action in this case, perhaps he ought to recover a much larger sum than the amount of the present verdict, and by a new trial, if he makes out his case, and does not interfere improperly with the jury, he will finally be benefited by obtaining the whole sum to which he claims he is entitled.

On the whole, I am of opinion that the verdict should be set aside, and a new trial granted. The defendants contend that the plaintiff should pay the costs of the trial. It has been usual, I believe, in like cases, to let the costs abide the event. I shall do so here, but plaintiff must pay \$10 costs of the motion.

NEW-YORK COMMON PLEAS.

WARD, Survivor, &c., Appellant, agt. SYME, WORDSWORTH, AND
MASON, Respondents.

The Code has not abolished the *attorney's lien upon the judgment for his costs* or his *compensation* rendered in obtaining the judgment. And the lien exists, whether the amount of the attorney's compensation is agreed upon or depends upon a *quantum meruit*. (*The views expressed in 4 How. Pr. R. 337, and 5 id. 350, upon this question, not concurred in.*)

All that the Code has done, has been to abolish the fee bill under the Revised Statutes, and to take away all restraints upon attorneys making agreements with their clients for their services; but this does not touch the attorney's *lien* for such services; that has existed by a long current of authorities, and still exists under the Code.

General Term, Dec., 1852. This action was commenced prior to the Code of Procedure. At the trial the plaintiff was non-suited, and judgment entered for costs in favor of the defendant, Wordsworth, who defended by Alfred E. Coren, Esq., as his attorney. Coren served a notice on the plaintiff that he claimed a lien on the judgment to the full amount thereof for costs due him in the suit. After the Code of Procedure came into effect, the plaintiff appealed to the Court of Appeals, where the judgment was affirmed with costs, and judgment entered on the remittitur for costs, in the Court of Appeals, in favor of Wordsworth, Coren being his attorney in the Court of Appeals. After the entry of the judgment for costs to Wordsworth in this court on the remittitur from the Court of Appeals, E. C. Gray, Esq., the party plaintiff in interest, he not having any knowledge of the service of the notice of lien on the plaintiff, (as he stated in his affidavit,) paid Wordsworth a portion of the original judgment in his favor, and obtained from him a satisfaction piece, and had that judgment cancelled of record. Coren then applied to this court to vacate the entry of satisfaction of the original judgment, and to take the satisfaction piece off the files. His Honor, Judge INGRAHAM, made an order upon that application granting the motion unless the plaintiff's executors, (he having died pending the appeal,) or

said Gray within a certain time paid to Coren the balance of the judgment, with costs of motion. This balance, with costs of motion, was paid by Gray to Coren, and the latter then served on Gray and the executors a notice that he had a lien on the judgment entered on the remittitur in favor of the respondent Wordsworth for costs in the Court of Appeals, to the full amount thereof for costs due him. After the service of this notice, Gray obtained from Wordsworth a satisfaction-piece, and had that judgment also cancelled of record. Coren then applied to have the entry of the satisfaction of that judgment vacated, and the satisfaction-piece taken off the files, which application was denied by his Honor, Judge INGRAHAM, and an order to that effect entered. (See 9 *New-York Legal Observer*, 818.) From that order the said Coren appealed to the general term.

F. H. B. BRYAN, *for Coren*.
E. C. GRAY, *Contra*.

DALY, Judge. This is an appeal from an order made at Chambers. The defendant Wordsworth recovered judgment against the plaintiff for costs. The defendant paid the judgment to Wordsworth, and it was regularly satisfied of record. Wordsworth's attorney moved to vacate the satisfaction, claiming to have a lien upon the judgment for his costs, of which it appears he had given due notice to the plaintiff, before the plaintiff paid the judgment. The application was denied upon the ground that an attorney has no longer any lien for his costs; and the point to be determined upon the present appeal is, whether the Code has abolished the attorney's lien. The point came up in Davenport agt. Ludlow, (4 *How. Pr. R.* 887,) and Benedict agt. Harlow and Wendell, (5 *How. Pr. R.* 850,) and SHANKLAND, J., in the one case, and WILLARD, J., in the other, were of opinion that the lien no longer existed; but both cases were decided upon other grounds. In the latter case Justice WILLARD says, "The reason for upholding a lien in favor of the attorney does not exist under the Code. This compensation is no longer measured by the fee bill, but rests

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in contract. There is no higher necessity for granting him lien on the judgment for costs than there is that the carpenter or mason should have a lien upon the house he had built, or that an agister of cattle should have a lien upon the animals he depastures, neither of which had a lien at common law. The principles on which a lien is given to inn-keepers and certain mechanics, who have made repairs upon property of their customers, are inapplicable to attorneys." To the reasons here given, Judge INGRAHAM adds in the opinion delivered upon deciding the motion below, that, by the Code, the costs are given to the party, and not to the attorney. "The attorney," he remarks, "is left to make his own agreement with his client. He may agree with his client to charge the costs, or more or less; but without some agreement so made, the costs are solely the property of the party, and not of the attorney." Before proceeding to examine these reasons more at length, it may be remarked, in respect to the observations of Justice WILLARD, that it is no longer an open question whether there is any foundation in principle why the attorney should have a lien upon the judgment for his costs. It has long been settled that he had a lien; but the only inquiry now is, whether the Code has changed the law. But if the question was still open, it would be found that in all the cases put by the learned justice, the right to a lien was placed upon grounds peculiar to each case, without at all impairing the general principles upon which the right of lien is founded. In the case of the mason and carpenter, the element of possession is wanting, the possession of the thing upon which the lien is claimed being in the owner of the land; and not in the builder. Lickham agt. Mason, (6 East. 27.) And the agister who depastures cattle, like the keeper of a livery stable, has no lien upon the property, first, because the keeping, it has been held, imparts no additional value to it; Jackson agt. Cummins, (5 Mass. and Welsb. 342;) and secondly, because he has not the entire possession, it being held subject to the right of the owner to use and control it. Wallace agt. Woodgate, (1 C. and P. 575;) Bevans agt. Waters, (3 C. and P. 528;) Sear agt. Morgan, (4 Mass. and

Webb. 283.) As a general rule a lien does not exist unless the party claiming it is in possession of the thing, and has by expending labor and skill enhanced its value, (*Montague on Lien*, 5; *Cross on Lien*, 31; to which necessarily there are some exceptions, as in the case of a seaman who has a lien upon the vessel for his wages, because he contracts with the master upon the credit of the ship; *Wilkins agt. Carmichael*, (*Douglas*, 101;) *Clay agt. Smyelson*, (1 *Lord Raymond*, 577; *Abbott on Shipping*, 414;) and those who repair or furnish supplies to a vessel have a lien upon it; but the principle is derived from the civil law, the equitable spirit of which recognises a proprietary interest in those who bestow labor or furnish materials toward the improvement of the property of another. In the conflict between the English Courts of Admiralty and the Courts of Common Law, the right in these cases was derived by the latter courts; so that where it is not a matter of statute regulation, it rests exclusively upon grounds of maritime policy. (*Abbot*, 148, 149; *Benedict's Admiralty*, § 271.) In the case of the attorney's lien upon the judgment for his costs, there can be no possession in either party. The judgment is a record, and under the control of the court; and the right to the lien, it is to be presumed, was originally recognised upon the ground that the attorney had contributed by his labor and skill to the recovery of the judgment; and the court, having the power to control it, would exercise that power for the protection of its own officers. There exists no reported case showing when, or for what reason, it was originally allowed. "Any attempt," says Mr. Cross, in his work on Lien, "to trace its origin or establish the period of its introduction, is useless." Sir James BARROW, who was present during the argument of *Wilkins agt. Carmichael*, (1 *Doug.* 100,) mentioned to Lord MANSFIELD that the first instance of an order of that kind in the King's Bench was in the case of one Tayler, of Cresham, about the time of a contested election for that borough; to which Lord MANSFIELD replied, that he had himself argued the question in chancery. In deciding *Wilkins agt. Carmichael*, he said that the practice was not then very ancient; that it was established

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on general principles of justice ; and that courts then, both of law and equity, had carried it so far that an attorney or solicitor might obtain an order to stop his client from receiving money recovered in a suit in which he had been employed for him, until his bill was paid. Some years after, the rule was thus laid down by Chief Justice WILMOT, in *Schoale agt. Noble*, (1 *H. B.* 23.) An attorney has, as between himself and his client, a lien for his fees and disbursements, upon the damages and costs recovered in an action ; and the rule was acted upon by Lord HARDWICK, in *Freeman agt. Gibson*, (3 *Atkins*, 720,) who said, " I am of opinion that a solicitor, in consequence of his troubles and the money he disburses for his client, has a right to be paid out of the decree, and has a lien upon it ;" and the rule was more fully defined in *Ormond agt. Tate*, (1 *East.* 464,) " An attorney has a lien upon a sum awarded in favor of his client, as well as if recovered by judgment ; and if after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself, and he will not be prejudiced by a collusive release from the plaintiff to the defendant ;" and the rule was finally carried so far in the King's Bench, that that court refused to allow the defendant to set off to the prejudice of the plaintiff's attorney costs recovered by the defendant against the plaintiff in another action.

The Court of Common Pleas, however, refused to go this length, and allowed a set off in all such cases, holding that the lien of the attorney was subject to, and must give way to the equitable rights of the parties ; that it could not be permitted to interfere with their right to set off one claim against another. (2 *Black.* 869 ; 1 *H. Black.* 23 ; 2 *Id.* 440 ; 2 *Black.* 827 ; 2 *B. and A.* 28, 587 ; 1 *N. R.* 228 ; 4 *Taunton*, 682 ; *Douglas*, 288 ; 4 *T. R.* 465 ; 5 *Id.* 561 ; 8 *Id.* 69 ; *Forrester's R.* 109 ; 8 *East.* 262 ; 1 *Taunton*, 341 ; 5 *Id.* 429 ; 1 *Aust.* 287 ; 1 *M. and S.* 240 ; 1 *East.* 464 ; and 4 *Watts*, 340.) The two courts thus stood in conflict until the adoption of the new rules in 1888, when the rule of the King's Bench was made applicable to all the courts. The lien of the attorney upon the judgment for his

costs was recognised in this state at an early period; and in *Spence agt. White*, (1 *Johnson's Cases*, 102,) and *Shepherd agt. Watson*, (3 *Caines*, 165,) the rule of the Common Pleas upholding it subject to the equitable rights of the parties was adopted in preference to the rule of the King's Bench. By the law, therefore, as it existed in this state before the passage of the Code, an attorney had a lien for his costs subject to the equitable rights of the parties; and if the party against whom the judgment was recovered paid the costs to the opposite party after he had received notice of the attorney's lien, it was regarded as a fraud upon the attorney's rights, and the court would enforce the judgment to the extent of the attorney's lien. *People agt. Manning*, (18 *Wend.* 652;) *Martin agt. Hawks*, (15 *Johnson's R.* 405.) Has this right been taken away by the Code?

Two reasons are assigned by the learned justices, from which they infer that it no longer exists. First, because the costs are now given to the party, and not to the attorney; and, second, because his compensation is no longer measured by the fee-bill, but rests in contract. In respect to the first, the Code has made no change in the law; the costs always belonged to the party, and not to the attorney. Before the Statute of Gloucester, (6 *Edward I.*, *Evans' Statute P.*), the prevailing party was not entitled to recover costs; but though costs were not given by the common law *eo nomine*, they were always included or taken into account in fixing the quantum of damages in all actions where damages were recoverable; and the Statute of Gloucester was passed to enable the prevailing party to recover them, not only in actions where damages were recoverable, but in other actions. The words of the statute are, "the demandant may recover the costs of the suit together with damages." And after the statute the costs were entered upon the roll as increased damages, or, as usually expressed in the record, damages adjudged of increase. The costs, therefore, were recovered by the party, and belonged to the party, and not to the attorney. (*Hallock on Costs*, 525.) By the act passed in this state "concerning costs," (1 *R. S.* 848,) they were also given to the party. The words of the first section are: "If any person shall sue in

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any court of record in the state, in any action, &c., and shall recover damages in such action, then the plaintiff or demandant shall have judgment to recover costs against the defendant." And in the ninth section, which provides for the plaintiff's recovery upon writ of *scire facias* and other cases, the words are: "And shall likewise recover his costs of suit." So in the provision made in the second section in the event of a judgment for the defendant: "He shall have a judgment for his costs against the plaintiff." It is the same in the first section of chapter 10, (2 R. S., page 703, 8d edition :) "The plaintiff shall pay to the defendant his costs to be taxed." In the third section: "If the plaintiff recover judgment, &c., he shall recover the costs allowed for services in the court:" and so throughout the many provisions of the first title of the chapter, the costs are uniformly referred to as the costs of the party. The second title merely regulates the amount which shall be allowed for services thereafter done or performed by officers of the court. It prescribes what sum shall be allowed for services performed by attorneys or counsellors: that is, allowed to the plaintiff or defendant who recovers judgment. There is no provision which declares that it shall be allowed or given to the attorney. On the contrary, it is given to the prevailing party for the services of the attorney he has employed; and he, and not the attorney, recovers it in the judgment. Where he has employed no attorney, but conducts the suit himself in person, he cannot recover for his services. (Stewart agt. The New-York Common Pleas, 10 Wend. 597.) He can recover costs only when those services have been performed for him by an officer of the court. The Code, therefore, by giving to the prevailing party certain sums by way of indemnity for his expenses, has not in this respect changed the position of things. It does not take anything away from the attorney and give it to the party. It simply recognises the right of the party to be indemnified for his expenses, a right which was recognised and provided for by all the provisions of the statutes; and it changed the mode in which that indemnity shall be ascertained and fixed, by substituting for the former tariff of fees. a new

measure of compensation. All that the attorney ever had was a lien upon the fund if it came into his hands, upon the papers in his hands, and upon the judgment ; but the costs belonged to and was recovered by the party. It remains but to inquire whether the abolition by the Code of all statutes regulating the fees of attorneys—and of all rules or provisions of law preventing an attorney from agreeing with his client for his compensation, and leaving the measure of such compensation to the agreement of the parties, express or implied—has affected the attorney's lien. By the English practice the amount that the prevailing party was entitled to recover for the services of an attorney was determined by the taxing officer, and included in the judgment, and the amount thus fixed in the absence of a special agreement was regarded as the proper measure of compensation between the attorney and his client. In other cases, the party was bound to have the attorney's bill taxed within a month after it was served upon him ; and the bill thus taxed was the measure of compensation in an action brought by the attorney against his client to recover for his services ; or, if he omitted to tax, the bill was deemed conclusive as to the reasonableness of the charges, and he was not permitted to dispute the items upon the trial. Williams agt. Firth, (1 Doug. 197 ;) Hooper agt. Tile, (*Id.* 198 and note ;) Anderson agt. May, (2 B. and P. 287.)

In this state the amount which an attorney might claim for his services, or which might be allowed for such services by the court, was made a matter of statute regulation by an act passed the 18th of February, 1789, in which it was provided that no officer or other person should exact, demand, ask, or be allowed any greater or other fee or reward, for or in respect to any service to be done or performed, than such as was therein specified. The act thus prescribes the sums that shall be allowed respectively for certain services. (*Jones and Varick's Edition of Laws of New-York*, vol. 2, 417.) And the regulation of these sums, or rather the adjustment of a tariff of fees, has been the subject of constant statutory provision from that time down to the passage of the Code. It was accordingly held that, as the

statute marked out and particularized the costs which could be recovered for the services of an attorney, and had forbidden attorneys to exact or demand any more or other than such as was specified by the statute, an attorney in an action against his client for his costs was restricted to the amount which was recoverable as costs in the action. Scott and Wigram agt. Elmendorf, (12 J. R. 315,) in which case the defendant obtained a verdict against the plaintiff. The defendant's attorneys sued their client for their costs; and it was held that as the plaintiff, by the statute, could have recovered but Common Pleas costs, the attorneys were limited to that amount; and it was doubted, in case they had made an agreement with their client for a greater sum, if, under the statute, they could have recovered it. All these statutes have been abolished by the Code, and the attorney's compensation is now left to the agreement of the parties, express or implied. But the repeal of these statutes cannot affect the attorney's right to a lien upon the judgment. He did not derive his lien from them. It existed long before any fee-bill was enacted. They regulated or fixed the amount which he could recover for his services in certain cases, and in that respect necessarily limited the extent of his lien, but did not create it. For services not embraced in these statutes he had a lien upon the papers, or upon the funds of his client in his hands, and his lien upon the judgment was limited by them to a certain amount prescribed for services rendered in obtaining it. All that the Code has done has been to abolish the fee-bill, and to take away all restraints upon attorneys making agreements with their clients for their services. It has left the attorney to agree with his client for a 'greater or less sum than is given to the party by way of indemnity for his expenses; but this does not touch the attorney's lien. His right to it was established by a long current of authority; and unless it is expressly taken away, or is wholly inconsistent with the change that the Code has made respecting costs, it may still exist. I cannot see how this legislation can be regarded as abolishing it, or affecting it at all. The right to a lien for services rendered is a distinct thing. The measure by which

the value of those services is to be ascertained is another. The latter has been made the subject of statutory regulation, the former has not. The statute has not interfered with the right of lien except to limit the extent of it, and when that limitation is removed by the repeal of all statutes regulating the fees of attorneys, the right of lien upon the authority of adjudged cases stands precisely as it stood before those statutes were enacted.

Justice WILLARD thinks the reason for upholding the lien does not exist, because the attorney's compensation is no longer measured by the fee-bill, but rests in contract; but this has nothing to do with the reason upon which the right to the lien is founded. The reason why an attorney has a lien is, that he has contributed by his labor and skill to the obtaining of the judgment. (Read agt. Dupper, 6 T. R. 861.) And the manner in which the value of his services shall be ascertained, whether regulated and fixed by statute, or left to the private agreement of the parties, is entirely independent of his right to the lien. The learned justice seems to think, that as the rate of compensation between attorney and client was fixed by positive provision of law, the lien of the attorney can no longer exist, because the amount or extent of it is no longer regulated by statute. The fact that it must now be ascertained by other means, by proof of the private agreement of the parties, or by proof of a *quantum meruit*, seems to be regarded as a sufficient reason for supposing that a right has been taken away that in no wise depended upon the precise amount or value of the services. The same reasoning would apply with equal force against the right of lien in any case where the demand was unliquidated. It is not essential to the existence of a lien that the amount should be liquidated; it may exist as well in respect to a demand unliquidated as to one that is liquidated. (*Cross on Lien.*) The tailor who repairs a garment has a lien upon it to the extent of the value of his labor, though no agreement has been made as to the price; and so may the attorney have a lien upon the judgment to the extent of the value of his labour, where the parties have made no agreement as to the rate of compensation. It is possible that our courts, under the

Code, might, in the absence of any proof of the private understanding of the parties, regard the sum given to the prevailing party by way of indemnity for his expenses, as the proper measure of compensation in an action brought by an attorney against his client, or in determining the amount or extent of the attorney's lien upon the judgment, instead of proof of the actual value of the service rendered by him in obtaining it. Be that as it may, or whatever may be the means hereafter adopted for ascertaining the amount or extent of the lien, I think that it is quite clear that the right to it remains unimpaired, and that it is the duty of courts to enforce and protect it.

The order was appealable. It was made upon a summary application after judgment, and in a matter affecting a substantial right. (*Code*, § 249, *sub. 5*.) The order appealed from must be reversed and the motion granted, but without costs.

WOODRUFF, Judge. I concur in the result to which Judge DALY has arrived.

INGRAHAM, First Judge. I do not assent to the above conclusions, for the reasons stated by me on the motion originally. It is unnecessary for me to repeat them, as my brethren are agreed that the attorney's lien still remains.

NOTE.—In *ex parte Kyle*, (1 *California Reports*, 331,) it was held that an attorney had no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services; that such lien only extended to costs given by statute.

The Waterville Manufacturing Co. agt. Brown & Bryan.

SUPREME COURT.

THE WATERVILLE MANUFACTURING CO. agt. BROWN & BRYAN.

Where the certificate of the Town Clerk and the certificate of the Secretary of State, of the state of Connecticut, in authentication thereof, were introduced in evidence on a trial here to prove the corporate existence of the plaintiffs in that state, and it was objected by defendants, that under the Act of Congress the certificate of the Town Clerk was defective, "inasmuch as the attestation thereof was not under his seal of office, and did not show that he had no seal of office;" *held*, that the Act of Congress (*Stat. of Cong. of March 27, 1804, § 1; 2 Vol. Stat. at large, p. 208, ch. 56*) requires that the attestation of the keeper of the records and books shall be under his seal of office, "*if there be a seal.*" The court, however, ought not to presume the Town Clerk kept a seal of office, but rather to the contrary, when it knows that in analogous cases in our own state there is no such seal.

And where the bill of exceptions showed that the defendants objected, on the trial, "that the certificate of the Secretary of State accompanying this certificate was not sufficient to entitle the papers so offered to be read under the statute of the United States, because the Act of Congress did not apply to such a case; and that the same was not properly authenticated, pursuant to the Act of Congress relating to the authentication of such documents," *held*, that the defendants, on the motion for a new trial, could not upon the bill of exceptions raise and insist upon the objection that the certificate of the Secretary of State was defective, "in not stating that the Town Clerk's certificate is in due form, and by the proper officer," although such defect clearly appeared.

The defendants should be confined to the objections raised and excepted to on the trial. If the latter defect had been specified on the trial, *non constat*, the plaintiff would have supplied it by other proof.

Monroe Special Term, January, 1853. Motion on behalf of the defendants for a new trial, on bill of exceptions.

The action was tried on the 14th November, 1851, at the Monroe Circuit, before WELLES, J. On the trial it became necessary for the plaintiff to prove its corporate existence, under a statute of the state of Connecticut. The plaintiff claimed to be a corporation organized under a general statute of that state, entitled, "Of Joint Stock Corporations," the 196th section of which is as follows:—

"Any number of persons not less than three, who, by articles of agreement in writing, have associated, or shall associate,

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according to the provisions of this chapter, under any name assumed by them, for the purpose of engaging in and carrying on any kind of manufacturing, mechanical, mining, or quarrying business, or any other lawful business, and who shall comply with all the provisions of this chapter, shall, with their successors and assigns, constitute a body politic and corporate, under the name assumed by them in their articles of association."

Section 210 of the same statute requires certain things to be done before any corporation can be formed under it, such portion of which section as is necessary for the understanding of the points decided, is stated in the opinion of the justice, which follows. The other facts of the case are sufficiently stated in the opinion.

S. MATHEWS, *for Defendants.*

GEO. H. MUMFORD, *for Plaintiff.*

WELLES, Justice.—By section 210 of the statute of the state of Connecticut concerning joint stock corporations, under which the plaintiff claims to have been incorporated, it is provided, that before any corporation formed and established by virtue of that statute shall commence business, the president and directors thereof shall, among other things, make a certificate of the purposes for which such corporation is formed, the amount of their capital stock, the amount actually paid in, and the names of their stockholders, and the number of shares by each respectively owned; which certificate shall be signed by the president and a majority of the directors, and deposited with the secretary of that state, and a duplicate thereof with the town clerk of the town in which said corporation is to transact its business, and said secretary, and said town clerk, shall respectively record the same in books to be kept by them for that purpose, &c.

It was necessary, therefore, for the plaintiff, in order to establish its corporate existence within the contemplation of the act, to give legal evidence, among other things, that they had deposited the certificate mentioned, in the town clerk's

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office of the town in which the corporation were to transact its business.

To prove this fact, the plaintiff offered in evidence what purported to be a certificate of Wales B. Lounsbury, clerk of the town of Waterbury, New-Haven County, in the state of Connecticut, showing, among other things, that on the 18th day of August, 1847, the president and directors of the Waterville Manufacturing Company deposited in the town clerk's office in said town a certificate of their organization, giving a full copy thereof, which in point of form appears to be in conformity with the act before mentioned; that the same was duly recorded, and that the copy of the certificate given is a true copy from the record.

To this certificate of the town clerk was appended a certificate of the secretary of state of the state of Connecticut, in words and figures following, viz. :—

“State of Connecticut, office of Secretary of State :

“I hereby certify that Wales B. Lounsbury was, at the time of subscribing the foregoing attestation, and now is, the Town Clerk of the town of Waterbury, in New-Haven County, in said state, duly elected and sworn to a faithful discharge of his said office and trust, and that full faith and credit may and ought to be given to his official acts and attestations; and I further certify, that I believe the foregoing signature of the said Wales B. Lounsbury to be genuine.

“In testimony whereof, I have hereunto set my hand and affixed the seal of the said state, at Hartford, this 27th day of October, A. D. 1851.

[L. s.]

JOHN P. C. MATHER,
Secretary of State.”

This evidence was objected to on the ground, as the bill of exceptions states, “that the certificate of the secretary of State accompanying this certificate, was not sufficient to entitle the papers so offered to be read, under the statute of the United States, because the act of congress did not apply to such a case; and that the same was not properly authenticated, pur-

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suant to the act of congress relating to the authentication of such documents."

The objection was overruled, and the papers read in evidence, and the defendants' counsel excepted.

The act of congress referred to provides that "all records and exemplifications of office books, which are, or may be, kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court, or officer in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which said office is, or may be kept; or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer," &c. (*Statute of Cong. of March 27, 1804, § 1, 2 vol. statutes at large, p. 298, ch. 56.*)

It is now contended, 1st. That the certificate of the town clerk of Waterbury was defective, inasmuch as the attestation thereof was not under his seal of office, and did not show that he had no seal of office; and, 2d. That the certificate of the secretary of state did not show that the certificate of the town clerk was in due form.

The act of congress requires that the attestation of the keeper of the records and books shall be under his seal of office, "*if there be a seal.*" If there be no seal, then, of course, the attestation may be good without one. I think we ought not to presume the town clerk kept a seal of office, when we know that in analogous cases in our own state there is no seal of office. On the contrary, if any presumption is to be indulged in, it should be that there was no official seal of the clerk, for the reason that, if there was, it would have been affixed to his attestation. If the attestation had been by the clerk of a court in order to prove judicial proceedings, the presumption, perhaps, would be, that there was a seal.

But the certificate of the secretary of state is defective in not

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stating that the clerk's certificate is *in due form*, and by the proper officer.

It is contended in answer to this objection, that it was not specified upon the trial. The objection was, that the certificate of the secretary of state was not sufficient, &c., *because* the act of congress did not apply to *such a case*, and that the same was not properly authenticated, &c. I incline to think the bill of exceptions does not allude to the point now insisted upon. The objection related to two things: first, that the act of congress did not apply to such a case; and, second, that the secretary's certificate was not properly authenticated: no complaint was made of its form, or that it did not contain facts sufficient. The objection in this respect was, that it was not properly *authenticated*. To authenticate is to render authentic. Among other definitions of the adjective authentic, is the following: "Having a genuine original authority, in opposition to that which is false, fictitious, or counterfeit; being what it purports to be; genuine; true; applied to things, as, an authentic paper or register." (Webster.) Now, the certificate of the secretary of state conforms to this definition. It proved itself; enough appeared to give it genuine original authority; it was what it purported to be. It was genuine and true, as far as it went, and was good for all it contained. If it did not prove enough, the particular defect should have been pointed out, in order that the plaintiff might have given other proof to supply the defect. I suppose it would have been competent for the plaintiff to have introduced the clerk of the town of Waterbury, and proved by him all that was necessary in relation to depositing in his office the certificate of the president, directors, and company, as required by the statute of Connecticut; and we have no authority for saying it was not in the plaintiff's power to do so, if the objection in question had been pointed out. The act of congress, providing for this kind of evidence, is cumulative, and not intended to supersede the common law rules of evidence.

Upon the questions relating to the merits, I have only to say, that I think the evidence, taken together, was sufficient to

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entitle the plaintiff to recover. The defendant Brown cannot object that the instrument of October 26th, 1848, was not a joint proposition by both the defendants, and the subsequent transactions between the parties show that both Brown and Bryan regarded it in that light.

New trial denied.

SUPREME COURT.

THATCHER agt. DUSENBURY AND OTHERS.

A Court of Equity has no right to inquire into the proceedings of subordinate tribunals of special or local jurisdiction, (commissioners of highways for laying out roads, levying tax therefor, &c.,) with a view to set them aside if void at law, or for the purpose of staying or restraining such proceedings.

King's Special Term, January, 1854. A motion is made in this case for an injunction, under an order to show cause, made by Justice CLERKE.

The complaint alleges that the plaintiff is a holder of real estate in the town of Pelham, and a resident and tax-payer of that town.

That the defendants are commissioners of highways of that town, and, as such commissioners, have undertaken to open two several roads therein.

That such roads are unnecessary, and the proceedings for opening the same were conducted fraudulently in various respects, particularly alleged in the complaint; that the property taken for these roads was overvalued; that the plaintiff and the other tax-payers of the town are thus called upon to contribute from their property large sums of money toward the opening and construction of said roads.

That the defendant, Dusenbury, holds three offices incompatible with each other, and illegal to be held by the same person, that is to say, he is assessor, collector of taxes, and commissioner of highways.

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That Richard Collins, whose term of office expired in April last, was one of the commissioners of highways of the town of Pelham, who, together with the defendants Dusenbury and Scofield, laid out said roads. That neither Collins nor Dusenbury have ever taken or filed with the town clerk of Pelham the oath required by the statute to enable them to act as such commissioners in laying out said roads.

That by reason of the omission of the said commissioners to take and file their oath of office, and by reason of the fraudulent acts above referred to, all their acts in relation to said new roads, and the collection of the tax therefor, are invalid, void, and of no effect, and call for the equitable interposition of this court.

The plaintiff prays judgment that all the proceedings taken for the purpose of laying out said two new roads, and the assessments made on the property of the plaintiff and of the other tax-payers of Pelham for that purpose, and all the acts of the commissioners as to these new roads, and the confirmation of the vote of the jury by the supervisors of Westchester County, may be declared null, void, and illegal.

And the plaintiff prays for an injunction restraining the defendants from proceeding to collect the tax assessed upon the plaintiff and the other tax payers of Pelham for the construction of either of said roads, with a further prayer for a perpetual injunction restraining the defendants, or their successors in office, from any further proceedings in the premises.

F. H. B. BRYAN, *for Motion.*

ROBT. H. COLES, *Contra.*

ROCKWELL, Justice. The defendants have put in their answer; but from the view that I have taken of the matter, I have considered it entirely unnecessary to advert to its contents. The complaint, in my opinion, does not state a case which authorizes the interposition of this court.

The plaintiff supposes that the court, by virtue of its equity power, is authorized to relieve him, by declaring the proceed-

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ings for the assessment and levying of a tax to be void, and by restraining the collection of such tax.

In this I think he is clearly mistaken. A court of equity has no right to inquire into the proceedings of subordinate tribunals of special or local jurisdiction, with a view to set them aside, if void at law, or for the purpose of staying or restraining such proceedings. Mooers agt. Smedley and others, (6 *John. Ch. R.* 28;) The Mayor &c. of the City of Brooklyn agt. Meserole, (26 *Wend.* 132;) Van Doren and others agt. Mayor &c. of New-York, (9 *Paige*, 388;) Livingston agt. Hollenbeck, (4 *Barb. S. C. Rep.* 10;) Van Rensselaer agt. Kidd, (*Id.* 17.)

The motion for an injunction must be denied, with \$10 costs.

SUPREME COURT.

REDDY agt. WILSON.

Although a party is required to move at the earliest opportunity to get rid of an irregularity of his adversary, yet he will not be considered in default for not noticing and making such a motion at a special term *connected with a circuit*.

Livingston Circuit and Special Term, October, 1858. Motion to set aside complaint on the ground that there is no county named in the said complaint in which the plaintiff desires the trial to be had.

HARLO HAKES, *for Defendant.*

HAWLEY & HOLLIDAY, *for Plaintiff.*

WELLES, Justice.—The only objection to granting the motion which I deem worthy of consideration, is, that the motion was not made at the Chemung Circuit and Special Term, which commenced one week earlier than the present.

There is no doubt but a party must move at the earliest opportunity to get rid of an irregularity of his adversary, where the object is in no way connected with the merits, as is the case here. But it is not the practice, as I understand, to hold a

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party in default for not making a motion of this description at a special term connected with a circuit. Usually, such motions are not encouraged at the circuit, where there is generally more business, strictly pertaining to the circuit court as such, than can be transacted. This I have reason to believe is the case in the county of Chemung. In the present case, I think it would be too strict to hold the defendant involved in laches, for the reason mentioned, as it is by no means certain that the motion could have been heard at the Chemung Circuit, if it had been noticed there. It would only have been the trial of an experiment, which I think the defendant was not bound, at his peril, to have made.

The motion is granted, with liberty to the plaintiff to serve an amended complaint in twenty days after notice of this order; but no costs of the motion are allowed—costs are refused for reasons appearing in the papers, not necessary to be stated.

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WHITEHEAD agt. PECARE & SMITH.

The notice of a motion to set aside a judgment for irregularity, should contain the grounds of the irregularity complained of. (*See Rules Sup. Court, 25.*) A motion to set aside a judgment for irregularity should be made within one year from the entry of judgment, where a knowledge of the judgment exists. (2 R. S. 359.)

The omission to enter a rule, on the decision of the court in ordering judgment, is a defect that may be cured after judgment by amendment *nunc pro tunc*. It is not necessary that the copy of the rule for judgment to be annexed to the roll should be signed by the judge.

Under § 176 of the Code, the court is bound to disregard, or to order amended, any defect in the entry of judgment which does not affect the substantial rights of the party.

January Special Term, 1854. A motion was made in this cause to strike out a demurrer to the complaint as frivolous, and the motion granted, and judgment ordered for the plaintiff. No rule was entered with the clerk on this motion; but the

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plaintiff proceeded at once to enter up judgment and have the costs adjusted in the usual manner in May, 1852. The defendants, having knowledge of the judgment, made no motion to set the same aside until January, 1854. The defendants now move for an order setting the judgment aside.

POTTER, *for Defendants.*
for Plaintiff.

INGRAHAM, First Judge.—In this case judgment was ordered, on motion to strike out a demurrer as frivolous, but no order was filed or entered by the clerk on the decision. The plaintiff, acting on the decision which the judge had made, entered up judgment for the amount claimed in the complaint as directed by the judge. This judgment was docketed in May, 1852, and the defendants, after continued knowledge of its existence, now move to set it aside because the rule for judgment on the decision of the judge was never entered.

It appears to me that this is a motion clearly for irregularity. It is alleged this is no judgment. If so, it is only because this rule has not been entered, on which the judgment is founded, and not because the court has not authorized the entry of such a rule. There are several objections to setting aside the judgment, some of which I think are valid.

1st. The notice of motion or order to show cause should contain the grounds of irregularity. This is not the case here. (*See Rule S. C. 25.*)

2d. The motion should have been made within a year. The defendants knew, from the judgment, of its entry, and they have suffered a year and three quarters to pass away without any motion on their part; but, on the other hand, have repeatedly promised to pay it, and made no motion until they were troubled by supplementary proceedings. It is too late for such a technical objection. (2 R. S. 859.)

3d. The defect, if the motion had been made in season, was one that could have been cured by an amendment *nunc pro tunc*, and should, therefore, with more propriety be allowed now.

4th. I do not consider it necessary that the copy of the rule

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for judgment to be annexed to the roll should be signed by the judge. It is not necessary that any such order should be signed. The judge decides the motion. The clerk makes an entry of such decision, and it is the clerk's duty to see that the rule entered by the successful party corresponds with the decision of the court; a different practice has to some extent grown up, but it is not required by law.

5th. By section 176 of the Code, the court is directed to disregard any defect in the proceedings which shall not affect the substantial right of the party; and it further directs that no judgment shall be reversed or affected by reason of such error or defect. Whatever view may be taken of the objections before stated, this is very clear as to the duty of the court, either to disregard the defect or to order it amended. No harm has been done the defendants by the error; they have promised to pay the judgment repeatedly. The judgment has been entered up in conformity to the decision of the court, and it would, under such circumstances, be a perversion of justice to set it aside.

The motion is denied, with leave to the plaintiffs to enter the proper rule for judgment, *nunc pro tunc*, without costs.

SUPREME COURT.

Root agt. FOSTER.

In an action of *assault and battery*, the statements, in the complaint, of the business and employment of the parties, and the object and intent of the assault, together with the statement that it caused the plaintiff to be ridiculed, &c., held, not to be *immaterial or irrelevant*. Although not essential to entitle the plaintiff to sustain his action, are material on the question of damages, and may be proved.

Whether they can be proved without alleging them in the complaint, *Quere?*

At Chambers, Penn Yan, February, 1858. Motion to strike out portions of complaint for redundancy or irrelevancy. The action is for an assault and battery.

E. VAN BUREN, *for Defendant.*

D. B. PROSSOR, *for Plaintiff.*

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WELLES, Justice.—After carefully considering this case, I am inclined to think the matters in the complaint which the defendant's counsel moves to have stricken out, are neither redundant nor irrelevant. The first part of the complaint which is objected to, consists of a statement of the position and employment of the parties respectively, showing that they were produce buyers in the streets of Penn Yan, by which the plaintiff made certain gains and profits, &c. It is then alleged that the defendant unlawfully and maliciously, for the purpose of compelling the plaintiff to quit the streets and cease the business, and for the purpose of bringing him into disgrace and ridicule, then and there in the said public street, and in the presence of bystanders, with force and arms, violently assaulted the plaintiff, &c., and violently pushed and pulled, beat, struck, and kicked the plaintiff, and greatly bruised and wounded him, causing him to be ridiculed by the bystanders to his great damage, &c. It is objected by defendant's counsel that the statements of the business and employment of the parties, and the object and intent of the assault, together with the statement that it caused him to be ridiculed, &c., are irrelevant, and that the plaintiff would not be permitted to prove them upon the trial.

The allegations in question are not essential to entitle the plaintiff to sustain his action; but it is not correct to say they are immaterial. The motive and intent with which an assault and battery is committed, and the consequences resulting, are material on the question of damages, and may be proved. Whether they can be proved without alleging them in the complaint, is not necessary to decide. It does not lie with the defendant to object that the complaint is more specific than the law requires, unless some established rule of pleading has been violated, such as the statement of evidence, or the like. In the present case I cannot perceive how the defendant can be damaged by the statements objected to. It is competent for him to deny each and every allegation in the complaint, and thus put the plaintiff to the proof of the whole of it.

I think the complaint in this case conforms in principle with the common law rules of pleading, which, in most cases, are

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the best *criteria* by which to judge of pleadings under the Code. There is a precedent in CHITTY of a declaration, which in my judgment is not distinguishable in principle from this complaint. (3 Ch. Pl. 466, Pha. ed. of 1821; 2d vol. 858, 6th Am. from 5th Lond. ed.)

The motion is denied, without costs.

SUPREME COURT.

WILSON & CALKINS agt. ANDREWS.

SAME agt. SAME.

In supplementary proceedings, under the *first sub. of § 292 of the Code*, (1851,) a judge has no authority to grant an order for a judgment debtor to appear before such judge and answer concerning his property, at a time and place specified in the order, *out of the county to which the execution was issued*.

But under the *third sub. of the same section (292)* a justice of the supreme court has authority, at chambers, to *issue a warrant* for the arrest of a judgment debtor residing in the same judicial district, *but in a county different from that in which the judge resides*, to be brought before such judge for examination, &c. As a matter of expediency, however, this power should not be exercised, in case where the judgment debtor resides in a distant county, unless to prevent a failure of justice.

Where the judge at chambers, at Saratoga Springs, made an *order* for the examination of the judgment debtor who resided in the county of Essex, (and where the execution had been issued,) under § 292 of the Code; and an *order* forbidding a transfer or other disposition of his property, not exempt from execution, under § 298; also issued a *warrant* under the *third sub. of § 292*, and the orders and warrant were served, and the defendant brought before the judge; *held*, that although the order under § 292 for the examination of the defendant was irregular, and was therefore set aside, yet that did not affect the order forbidding the transfer of property—that still remained in force. Nor did it affect the warrant.

And the judge had a right under the warrant to appoint a *referee*, who might reside out of the county of the judgment debtor. (§ 295–300.) Also a *receiver* might be appointed, based upon the facts disclosed on the examination of the debtor brought up on the warrant.

At Chambers, November, 1858. On the 17th October last, the counsel for the plaintiffs presented an affidavit setting forth

the recovery of two judgments in the supreme court against the defendant; the issuing of executions thereon against the property of the defendant to the sheriff of Essex county, being the county where the debtor resides, and where said judgments were docketed, and the return of the same by said sheriff wholly unsatisfied, and alleging that the defendant had property which he unjustly refused to apply on said judgments, and that there was danger that the debtor would leave the state, setting out the reasons, &c.; and setting forth also, that there was danger, if an order should be served on the defendant, requiring him to appear and answer, instead of a warrant, he would disregard the same and avoid the service of process upon him thereafter, and alleging that said judgments were still due, &c.; and the counsel thereupon applied for an order for the examination of said defendant, under § 292 of the Code, an order forbidding a transfer or other disposition of his property, not exempt from execution under § 298, and a warrant under the 3d subdivision of § 292. The judge made the order for the defendant's examination, and the order forbidding a disposition of his property, and also issued his warrant under the 3d subdivision of § 292, to the sheriff of Essex county, requiring him to arrest the said defendant and bring him before the said judge to be dealt with according to law. This order was issued at Saratoga Springs, in Saratoga county, the residence of the judge.

The defendant was arrested by the sheriff of Essex county, and brought before the said judge, at his office in Saratoga Springs, at which place it was returnable, and the plaintiff's counsel thereupon moved that a referee be appointed to report the examination and evidence to the judge.

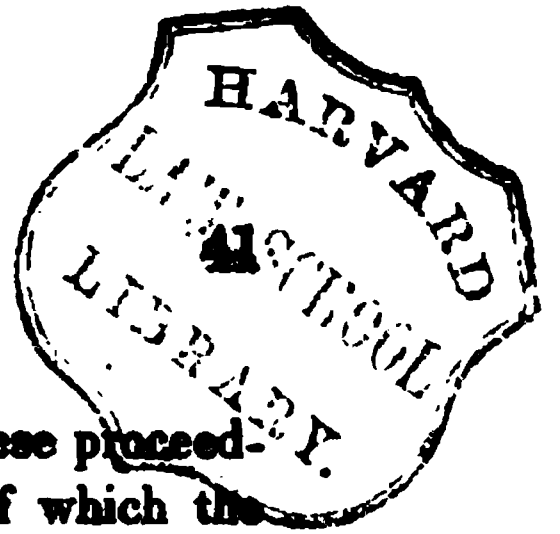
It appeared that the order for examining the defendant, and the order forbidding a transfer of property, were both served on the defendant.

The defendant's counsel moved to set aside the warrant, and for the discharge of the defendant, on the following grounds:—

1st. That the procuring and serving an order for the examining the defendant was a waiver of the warrant, and that no warrant could be issued while said order was in force.

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2d. That the defendant cannot be taken under these proceedings out of the county of Essex, to the sheriff of which the execution was issued, and where the defendant resided, and that the warrant is therefore void, so far as it requires the defendant to be taken out of the county of Essex.

3d. That the judge, though a justice of the supreme court, had no jurisdiction over the person of the defendant out of Essex county.

4th. That the judge has no authority to appoint a referee at all, and especially not to appoint one residing out of Essex county.

The judge decided that there was no occasion to examine the defendant under the order, if he was examined under the warrant. He appointed a referee to take the examination of the defendant, and observed, that on the coming in of his report, he would hear the foregoing questions more fully argued, and any others that might be raised, and decide the whole case together.

On the 26th October, the report of the referee was brought in, and the whole case was argued, both on the objections above stated and on the facts appearing on the examination. The counsel for the plaintiffs moved for the appointment of a receiver. The judge, on motion of the defendant's counsel, upon the facts appearing in the examination, discharged the defendant out of custody, and held the residue of the case under advisement until this day.

A. POND, for Plaintiffs.

GEO. G. SCOTT, for Defendant.

WILLARD, Justice.—The first question is, whether a justice of the supreme court has authority at chambers to issue a warrant under § 292 of the Code for the arrest of a judgment debtor residing in the same judicial district, but in a county different from that in which the judge resides. If this power be not possessed, there will be many cases in which § 292 cannot be executed. If no justice of the supreme court resides in the county of the debtor, and the debtor happen to be related

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to the county judge, or the latter is interested in the question, the creditor is remediless under this section. Although this is not a good reason for the exercise of authority where none is conferred, it is a good ground for believing that it has not been intentionally omitted, if it has been omitted at all.

The first branch of the section relates to the examination of the debtor after the return of an execution unsatisfied, in whole or in part. Under the Code of 1848, if the judgment debtor resided in the county where the judge resided, he must be required to attend personally before the judge; if in any other county, before a referee, who was required to certify the examination to the judge. (§ 247-251.) The Code of 1849 so altered this part of the section, as to require the debtor to appear before such judge, or a referee appointed by a judge of the court, at a time and place specified in the order. Under this section the judge appointed a referee, whether the defendant resided in the county of the judge or not—and he might be required to appear before the judge, whether he resided in the same county or not. (*See 9 Barb. 378.*) But the Code of 1851 has so altered this section, that the order for the defendant to appear and answer concerning his property must be before such judge, at a time and place specified in the order, *within the county to which the execution was issued*. The order in this case was irregular, in requiring the defendant to appear before the judge at his Chambers in Saratoga Springs, and it was, therefore, properly set aside. But that did not affect the order forbidding the transfer of property. That still remained in force. Nor did it affect the warrant, which was clearly supported by a sufficient affidavit.

The second subdivision of the section provides for the examination of the debtor *after* the issuing of the execution, and *before* its return. As these proceedings were not under that part of the section, I will proceed to the third subdivision of the section, which is an alternative proceeding to both the others. It provides that instead of an order requiring the *attendance* of the judgment debtor, the judge may, upon proof by affidavit

or otherwise to his satisfaction, that there is danger of the debtor's leaving the state, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such judgment debtor may be, to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath, and if it then appears that *there is danger of the debtor's leaving the state, and that he has property which he has unjustly refused to apply to such judgment*, he may be ordered to enter into an undertaking with one or more sureties, that he will from time to time attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property, not exempt from execution. In default of entering into such undertaking, he may be committed to prison, by warrant of the judge as for contempt.

The third subdivision does not, like the first and second, specify what judge may take cognizance of the case. Of course any judge within his jurisdiction may administer the act. It would be idle to confine it to a judge residing in the county of the debtor, when the latter is in his flight to another state, and is passing through another county. Hence the warrant requires the sheriff of *any county where such debtor* may be, to arrest him and bring him before such judge; that is, the judge who issued the warrant. As a matter of expediency, a justice of the supreme court should not order a debtor to be arrested and brought before him from a distant county, unless to prevent a failure of justice. The question in this case is not, whether in the given case the power was indiscreetly exercised, but whether the judge had any power at all. I think he had the power.

The granting an irregular order for examining the judgment debtor under the first subdivision was no waiver of the warrant. It was entirely harmless and was not carried into effect, but revoked by the judge.

The foregoing remarks dispose of the three first objections taken to the proceedings under the warrant.

The next objection relates to the power of appointing a referee to take the examination of the judgment debtor. Under the Code of 1848, there was no provision for the arrest of the debtor, save what is contained in the act of 1831 to abolish imprisonment for debt, and to punish fraudulent debtors. (*L. of 1831, p. 396.*) The Code of 1849 introduced the warrant, when it was made to appear that there was danger of the debtor's absconding, and made provision for his examination before the judge, or a referee. The Code of 1851, § 292, required, before granting the warrant, that it should be made to appear that there is danger of the debtor's leaving the state or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment. Upon being brought before the judge it is further provided that he may be examined on oath, &c. The 192d section is silent as to a referee, but the 295th section enacts that the party or witness may be required to attend before the judge, or before a referee, appointed by the court or judge: if before a referee, the examination shall be taken by the referee, and certified to the judge. And provision is also made for taking such examinations under oath. This provision is general, and obviously refers to an examination under a warrant as well as to other examinations. This section is a revision and enlargement of the 251st section of the Code of 1848. The 300th section also authorizes the judge, in his discretion, to order a reference to a referee agreed upon or appointed by him, to report the evidence or the facts.

The judge, therefore, clearly had a right to appoint a referee, and there is no provision requiring him to be a resident of the county of the debtor. The principle on which *Sherwood agt. Tremper* (11 *J. R.* 406) was decided, is inapplicable to a reference in supplemental proceedings.

It remains to inquire whether a receiver may be appointed, based upon facts disclosed on an examination of the debtor, brought up on a warrant. The 298th section, authorizing the appointment of a receiver, is general in its provision, and extends to this case. The object of the warrant is to secure the

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defendant from absconding, and thus to compel an examination. If the facts be such that a receiver is necessary to complete the remedy, he may be appointed as well upon an examination under a warrant, as under an order.

But I see no object in appointing a receiver, except to preserve the property, since the creditor by an action in the nature of a creditor's bill, in which the assignee of the judgment debtor should be made a party, can better assail the assignment than the receiver. Besides, the question whether a receiver represents the creditors, and can maintain an action to set aside a fraudulent assignment, is still pending in the court of appeals undecided. I will, however, if desired, appoint a receiver.

SUPREME COURT.

HOWARD agt. THE FRANKLIN MARINE AND FIRE INSURANCE Co.

The "Act to provide for the Incorporation of Insurance Companies," passed April 10, 1849, has this provision in it, to wit: "Suits at law may be prosecuted and maintained by any member or stockholder against such corporation for losses which may have accrued, if payment is withheld more than two months, in all risks after such losses shall have become due." (§ 16.) The act authorizes the organization of insurance companies either upon the joint stock, or mutual plan.

Where, therefore, an individual pays a *cash premium* on effecting an insurance in such company, he does not become a *member* or *stockholder* of the company, consequently, § 16 has no application to him.

Where such company insert in their policy a condition that "payment of losses shall be made in 60 days after the loss shall have been ascertained and proved, without any deduction whatever," it is a waiver of section 16, and the limit therein contained as to members or stockholders.

Albany Special Term, Nov., 1858. The defendants were sued on a policy of insurance issued by them to one John R. Ellis, of whom the plaintiff is the assignee. The answer of the defendants contained a general denial of the material alle-

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gations of the complaint, and interposed as a second defence, the premature bringing of the action, in these words: "The said defendants, for a further defence, state that this action hath been prematurely commenced, because they say that the said defendants were incorporated under, and by virtue of an act of the legislature of the state of New-York, entitled, 'An Act to provide for the Incorporation of Insurance Companies,' passed April 10, 1849: that by the express terms of the policy mentioned in the complaint, the alleged loss did not become due until sixty days after due notice and proof thereof, made to them by the assured: that said sixty days did not elapse (if ever) until the 28th of June, 1853; and that this action was commenced on the 29th of July, 1853, which was twenty-nine days before the two months allowed by the 16th section of said act had transpired, before this suit could be legally prosecuted and maintained by the plaintiff against them for said pretended loss."

The plaintiff moves to strike out the matter interposed in the answer as a second defence, on the grounds, 1st. That it is a *sham defence*; 2d. That it is *irrelevant*.

FANCHER & EAGER, *for Plaintiff*.

MERRILL & MCKINDLEY, *for Defendants*.

WRIGHT, Justice. The 16th section of the "Act to provide for the Incorporation of Insurance Companies," passed in 1849, provides that "suits at law may be prosecuted and maintained by any member or stockholder against such corporation for losses which may have accrued, if payment is withheld more than two months, in all risks after such losses shall have become due." The act authorizes the organization of insurance companies either on the joint stock, or mutual plan. The section of the act above quoted is not disabling but remedial in its nature; intending to give a remedy at law either to the stockholder or member of a corporation which at common law it was doubtful whether he possessed.

The plaintiff's assignor in this case was neither a member nor stockholder of the defendants' company, and the section cited

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has no application to him. The policy, or contract sued upon, shows that the insured party *paid a cash premium*; that he gave no premium note; and that the insurance was not in any wise upon the mutual plan, whereby Ellis would have become a member of the corporation. The contract between the parties abundantly evinces that he had no interest in the company whatever, which, at common law, would disable him from suing the corporation. He was a mere dealer, or contractor with the company, and in no sense a member or stockholder.

But if it were granted that section 16 applied to this case, still that section and the limit contained in it were expressly waived by the defendants when they made the contract of insurance with Ellis. One of the conditions annexed to the policy is as follows: "Payment of losses shall be made in 60 days after the loss shall have been ascertained and proved, without any deduction whatever." By the express terms of the contract, the defendants agreed to make payment in 60 days after proof of the loss; and it does not now lie with the defendants to say that payment was to be made at another time; or that they can withhold payment for the additional two months, mentioned in section 16. The condition above cited, annexed to the policy on which the action is brought, is expressive of the intent of the parties as to the time when the legal liability of the company to pay arose.

The matter of the answer proposed to be stricken out, palpably constitutes no defence. It is a sham pleading; but, if not, the matter is irrelevant, and should be stricken out. (*Code*, § 152, 160.)

Let an order be entered granting the motion, with \$10 costs.

SUPREME COURT.

STILES agt. COMSTOCK.

The rules of pleading, under the Code, allow the defendant to set forth by answer as many defences as he may have; and no rule is prescribed limiting him to *consistent* answers, or requiring him to *confess* the speaking of the words, if he would *justify*, in an action of slander.

The true course is to permit the defendant to put in as many defences as he is advised he has, *whether consistent with each other, or otherwise*. The answer, if *sham*, and not verified, can be stricken out under § 152, and if verified, it ought to be retained for trial.

In an action for slander, the defendant may prove the plaintiff's general bad character, in mitigation of damages, *whether he justifies or not*.

And it is questionable whether he can give evidence in mitigation, unless *he has set it up in the answer*.

Tompkins Special Term, Dec. 1853. This is a motion by the plaintiff to strike out the defendant's answer of justification, in an action of slander, and also the answer, that the defendant will give in evidence the general bad moral character of the plaintiff in mitigation of damages.

The complaint is for charging the plaintiff with forging a note of \$160, and also a like charge of forging a note for \$250. The defendant's first answer denies the speaking the words. 2d. That he will prove, in justification, that plaintiff did make and forge a promissory note of \$80 against one Stephen Stiles, and that the plaintiff confessed to the defendant the forgery aforesaid, before he spoke the words charged in the complaint, and that the defendant spoke the said words aforesaid, of, and concerning the forgery of the note in the answer set forth; and that the above facts would be given in evidence, both in bar, and in mitigation of damages. 3d. That the character of plaintiff was bad; and the same will be given in evidence to mitigate damages.

MR. BARRETT, *for Motion*.

MR. SEYMOUR, *Opposed*.

SHANKLAND, Justice. The motion to strike out the matter pleaded as a justification must prevail, on the ground that it is

irrelevant, under section 152 of the Code, which declares that *sham* and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court in their discretion may impose. The matters set up in that answer are irrelevant, because they in no respect are pertinent as a justification of the charge made in the complaint.

To prove that the plaintiff forged a note of eighty dollars is no justification of a charge that he forged a note of two hundred and fifty dollars, or any other sum. The defendant must confine his defence to the specific charge made. *Andrews agt. Vanduzen*, (11 *J. R.* 42;) *Palmer agt. Haight*, (2 *Barb. S. C. R.* 211;) *Skinner agt. Powers*, (1 *W. R.* 451.)

Nor are the matters contained in said second answer receivable in evidence, in mitigation of damages, except as they may have affected his general character; and if the forgery set up in the answer has affected the general character of the plaintiff, the defendant can avail himself of it, under his third answer in mitigation of damages.

The plaintiff's bad character can be given in evidence in mitigation of damages; but the plaintiff moves to strike it out, on the ground that it was unnecessary to set it up, in the answer; and the case of *Graham agt. Stone and Stone* (6 *How. Pr. R.* 15) is cited as authority for the proposition, that mitigating circumstances can not be set up in the answer, unless the charge is also justified in the answer.

I hold the better opinion to be, that the defendant may prove the plaintiff's general bad character in mitigation of damages, whether he justifies or not; and that it is quite questionable whether he can give evidence in mitigation, unless he has set it up in his answer. (See able opinion of SELDEN, J. in *Follet agt. Jewett & Foote*, 1 *American Law Register*, 600.)

But whether it is necessary that the mitigating circumstances should be stated in the answer, or not, it is quite certain that they are neither irrelevant under section 152, or 160, nor redundant under the latter section.

They are not irrelevant, because pertinent to the defence in mitigation of damages, and clearly admissible in evidence for

that purpose. They are not redundant, because that term is not applicable to an entire answer, or to one of several answers, but only to *superfluous* matters contained in an answer. (6 *How. Pr. R.* 355.)

The plaintiff urges as a reason why the answer in justification and in mitigation should be stricken out, that the defendant had denied the speaking of the words, and that it would be *inconsistent* with that denial to allow him to justify or to mitigate; and he cites in support of that position 6 *How. Pr. R.* 255, and some other cases. I recognize no such rule of pleading under the Code. Section 149 prescribes what the answer may contain; and section 150 gives permission to set forth, by answer, as *many defences* and counter-claims as the defendant may have, whether legal or equitable; but they must be separately stated.

The Code nowhere requires that one answer must be consistent with another; and I deny the authority of the courts thus to limit defendants in their rights. Nor is a denial of speaking the words inconsistent with the plaintiff's guilt; for the plaintiff may be guilty of forgery although the defendant never said he was. But it is said, that the plea of justification must admit the speaking of the words justified, and that such admission is inconsistent with the previous denial. Up to the last amendment of the Code in 1852, this was so, but now it is not so. It is no longer necessary to make the admission in a plea of justification. "All the forms of pleading heretofore existing are abolished; and hereafter, the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act." (See § 140.)

Among the rules thus prescribed is the one above recited, allowing the defendant to set forth by answer as many *defences* as he may have, and no rule is prescribed limiting him to consistent answers, or requiring him to *confess* the speaking of the words, if he would justify, in an action of slander. Nor should the courts prescribe such a rule, if they had the power. By the former practice, the defendant was allowed to plead the

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general issue, and to justify also. It is not an impossible, nor an improbable circumstance, that a plaintiff may *prove* the defendant spoke certain actionable words, although he never did speak them; but in such a case, if the rule attempted to be established is to prevail, the defendant would be limited to the *denial* of the speaking, and be deprived of a *justification*, or he must forego his denial of speaking the words, and resort to his justification, and make an admission, *under oath*, of the speaking of the words he never in fact spoke.

The only course consistent with the Code, and with the rights of the parties, is to permit the defendant to put in as many defences as he is advised he has, whether consistent with each other, or otherwise. The answer, if *sham*, and not verified, can be struck out under section 152, and if verified, it ought to be retained for trial.

The motion to strike out the second answer, both as a bar and in mitigation, is granted; and the motion is denied as to the third answer in mitigation.

No costs of this motion to either party.

SUPREME COURT.

GOULD and OTHERS agt. WILLIAMS & OTHERS.

An answer drawn in conformity with approved usage in chancery pleading, admitting specifically all the statements in the complaint, and stating various legal propositions and arguments in defence, cannot be sustained under the Code.

An answer now must either *deny* allegations found in the complaint, or state *new matter*, by way of evidence.

Albany Special Term, July, 1853. Motion to strike out irrelevant or redundant matter. The action was brought to obtain a judicial construction of the will of William Gould, deceased.

The plaintiffs are executors of the will. The complaint states the making of the will—the death of the testator—the proof of

the will, and granting letters testamentary to the plaintiffs—the death of the widow of the testator, and the provisions of her will, so far as they relate to the estate of her husband. The complaint also states, that the husband of the defendant, Betsey Williams, died between the time of making the will and the death of the testator. By the terms of the will, Mrs. Williams was entitled, as a residuary legatee, to two twenty-third parts of the estate.

The defendant, Mrs. Williams, put in her answer, in which she admits specifically all the statements of the complaint; but in respect to the will of Mrs. Gould, she says, that “as to how she left or bequeathed the residue of her estate or property, she has no knowledge, except from the complaint,” and then adds, what the plaintiffs move to strike out, which is as follows:—“but while she believes there is a clause in her will as to her residuary property similar to what is contained in the said complaint, yet this defendant insists, that on the face of the said complaint, the said Mary Gould did not take any of the said residuary estate and property of the said testator, William Gould, and did not, and could not bequeath or give any share, right, or interest therein, to any of the parties who are benefited by her own will. And she denies that any of such parties have any claim to any legacy or share of, or embraced by, or in the residuary estate and property of the said William Gould, deceased.”

Again, after admitting the death of her husband, as stated in the complaint, and that she remained unmarried, and claiming that, upon the death of Mrs. Gould, she became entitled to receive her share of the estate, she proceeds as follows: “and she insists that it could, and should have been then done, and she insists that she is from that time (the 7th day of February, 1852) entitled to interest thereon, at the statute rate of interest of the state of New-York; that, so far as regards such, her rights in such residue, there is no legal point to justify the plaintiffs to file their said complaint, and thereby delay this defendant in the receipt of such two parts, and that such interest, with her costs, disbursements, and counsel fees, to be cer-

tified and allowed by this honorable court, should be adjudged to be paid by the residuary legatees, under the said will of the said Mary Gould, deceased, or by William G. Banks, in the complaint mentioned, or by the executors, either individually or out of any assets there may otherwise be of the estate of the said William Gould, deceased. Also, this defendant insists, as she is advised, that the residuary estate or property of the said William Gould is, in its division and distribution, to be considered as personalty." This, also, the plaintiffs moved to strike out.

OTIS ALLEN, *for Plaintiffs.*

CH. EDWARDS, *for Defendant, Williams.*

HARRIS, Justice.—The answer in this case is in conformity with approved usage in chancery pleading. It was drawn by one who had attained eminence as a skilful equity practitioner. But it is not such a pleading as the Code sanctions. The answer admits specifically, without a single exception, I believe, all the statements of the complaint. This was always regarded as proper, and frequently was required in chancery practice; but such admissions form no part of the answer authorized by the Code. An answer now must either deny allegations found in the complaint, or state new matter. Whatever else it contains is irrelevant or redundant. Tested by this rule, the whole answer in this case is objectionable. It does not controvert a single fact stated in the complaint, or state any new fact by way of defence. Had the plaintiffs moved to strike out the whole answer as irrelevant, I do not see why the motion should not have been granted.

Having admitted the facts alleged in the complaint, the defendant proceeds to state various legal propositions and arguments, very much the same, I suppose, as will be embodied in the points presented by her counsel, when the case shall be brought to a final hearing. They should have been reserved for that occasion. This part of the answer the plaintiffs move to strike out. The motion must be granted. I feel bound, too, though it is with some regret, to grant costs of the motion.

SUPREME COURT.

CORNING agt. POWERS and OTHERS, EXECUTORS, &c.

On the trial at the circuit, the court directed a verdict for the plaintiff for \$5,000, subject to the opinion of the supreme court, on a case to be made by the plaintiff's attorneys, and "*court to allow such interest, if any, as they deem the plaintiff entitled to, with liberty to either party to turn the case to be made into a bill of exceptions.*" On the argument of the case at general term, that court made its decision, which was entered as follows: "Erastus Corning agt. S. Sherwood Day. Judgment for plff. for \$5,000, and interest from demand."

On a motion to correct this entry and for judgment, &c., *held*, that to say nothing of the defect in the title of the cause, the directions filed at general term were entirely insufficient to enable the clerk to perfect a judgment. They do not contain "a final determination of the rights of the parties."

But the order could not be amended or vacated at a *special term*, because it was a question *affecting the judgment* given at the *general term*. Such an application should be made only at general term. It is otherwise, where the application does not involve any question affecting the judgment.

That is, in all cases of irregularity *merely*, or to open a default, and in every case where the court at general term do not pass upon any portion of the *merits*, the motion is properly made at *special term*.

Albany Special Term, July, 1853. Motion to vacate rule for judgment, or for other relief. Upon the trial of this action, at the Greene Circuit, in December, 1848, the court directed a verdict for the plaintiff for \$5,000, subject to the opinion of the supreme court, on a case to be made by the plaintiff's attorneys, and *court to allow such interest, if any, as they deem the plaintiff entitled to, with liberty to either party to turn the case to be made into a bill of exceptions.* A case was made, and the cause argued before the general term in May, 1850. In the list of decisions filed with the clerk at the general term held at Albany, in May, 1851, the following entry was made: "Erastus Corning - agt. S. Sherwood Day. Judgment for plff. for \$5,000, and interest from demand." This entry was transcribed by the clerk into the judgment-book kept by him. No other decision or order for judgment has been entered, and no proceedings, on the part of the plaintiff, for the purpose of perfecting judgment, have been taken.

In June, 1851, the defendants' attorneys served a bill of ex-

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ceptions, as proposed by them, which was settled by the lapse of time, and finally signed by the judge who tried the cause in August, 1851. Believing, as they state, that a final decision in the action had been made, and that an appeal could not be brought until judgment should be perfected, the defendants' attorneys frequently applied to the plaintiff's attorney to enter and perfect his judgment. The defendants in this action are James Powers, Edgar B. Day, and S. Sherwood Day, executors, &c., of Orrin Day, deceased.

The defendants moved that the decision or judgment of the court on the case be made and entered in this cause, and against all the defendants, as executors of Orrin Day, as of the term when the motion should be made; that the court direct, order, and determine, in and by its decision and judgment, the amount to be recovered; that the court ascertain, direct, and order the amount of interest to be recovered, or determine from what time interest shall be computed, and that the plaintiff be required to perfect his judgment, and file a judgment roll. The action was brought in May, 1848, and it appeared upon the trial that the money, for the recovery of which the action was brought, had been demanded of the executors *within a year* before the suit was brought.

M. SANFORD, *for Plaintiff.*

H. HOGEBOOM, *for Defendants.*

HARRIS, Justice.—I am inclined to think that the decision entered in May, 1851, is too imperfect and uncertain to be allowed to stand, without amendment, as the “final determination of the rights of the parties.” It having been referred to the court, at a general term, to give such judgment in the case as ought to have been given at the circuit, it was the duty of that court so to declare that judgment as that the clerk could properly enter it. It should have had all the certainty requisite in a verdict. Suppose, instead of withdrawing the case from the consideration of the jury, it had been submitted to them, with directions to find a general verdict, and to assess the damages, if such verdict should be for the plaintiff,

would it be enough for the jury to say that they had found a verdict for the plaintiff, and had assessed his damages at \$5,000 *and interest from demand*? How could judgment be perfected upon such a verdict? Who should determine the amount of the recovery? In this case, what amount of interest shall be added to the verdict? The maxim, *id certum est, quod certum reddi potest*, cannot apply to such a case. There is nothing by which the clerk can determine, with certainty, what amount of interest the court intended to award. It would not be for him to look into the case to find out, if he could, what the court intended; or, if he had, he would have found merely that the demand to which the court probably referred was made *some time* within a year preceding the commencement of the suit, and that the suit was commenced *some time* in the month of May, 1848. To say nothing of the defect in the title of the cause, I regard the directions filed in May, 1851, as entirely insufficient, without amendment, to enable the clerk to perfect a judgment. They do not contain "a final determination of the rights of the parties."

But whether this order should be amended by correcting the title and specifying the amount to be recovered by the plaintiff, thus depriving the defendants of the right to appeal, or whether it should be vacated and a new order entered, is a question which ought not, I think, to be decided at a special term.

The 27th rule of this court requires all non-enumerated motions, except when otherwise directed by law, to be heard at a special term. I have no doubt of the authority of the court, at special term, to determine questions of practice, even though they involve the regularity of proceedings at the general term. It was no unusual thing in the old supreme court to apply at special term for relief against a rule obtained at a general term. It was only when the relief sought affected the adjudication which had been actually made, that it was deemed necessary to apply for such relief at the general term. If, in this case, the application had been made to correct the error in the title of the cause, or had involved any other question not affecting the judgment which had been pronounced, I do not see

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that the power or propriety of giving effect to that judgment, by an order at special term, could be questioned. But when, as in this case, the application is to vacate the order directed by the general term, and to declare what was, in fact, the judgment which the general term intended to render in the case, such application should be made at a general term. Even if the special term has jurisdiction—and it may be that it has—it would appear a little unseemly for a court held by a single judge thus to intermeddle with an adjudication made by a court composed of three judges. To avoid this unseemliness, if for no other reason, I think the better practice would be to apply at a general term only for relief against the proceedings had at a general term. Following this suggestion I shall deny this motion, but without costs, and with liberty to the defendants to renew it at the next general term.

NOTE.—Application was subsequently made at a general term, and the rule for judgment was vacated, and judgment rendered for the plaintiff for \$5,000, with interest from the first day of June 1848.

SUPREME COURT.

OSTROM, RECEIVER, &c., agt. BIXBY.

The complaint was upon a promissory note. The *answer* admitted the making of the note, but denied that it was for the accommodation of defendant; and alleged that it was for the accommodation of the assignor of plaintiff, and belonged to him to pay. The defendant then set up the *statute of limitations*. On motion to strike out that part of the answer which set up the statute of limitations, as a *sham* and *inconsistent* defence, *held*, that it was *neither*. Why? Because it was not *false*. (*The definition of a sham plea as given by Justice BARCULO in Nichols agt. Jones, 6 How. Pr. R. 355, approved.*)

It seems that there is no provision in the Code which allows answers to be struck out on the specific ground of *inconsistency*, as such. They must appear to be *false* before such a motion can be entertained.

Whether the doctrine expressed in *Mier agt. Cartledge, (8 Barb. 75,)* that if a pleading is *verified*, as required by the Code, a motion to strike it out as *false* cannot be entertained, ought not to receive further consideration before it is adopted as the settled practice?

This is a motion to strike out that part of the answer which sets up the statute of limitations as a sham defence, and inconsistent with the further defence set up in the answer. The complaint alleges that Jones, the assignor of plaintiff, signed with defendant a note made for defendant's accommodation; that Jones subsequently paid the note, and thereby defendant became liable to pay the plaintiff as assignee and receiver of Jones. The answer admits the making of the note, but denies that it was for the accommodation of defendant, and alleges that it was for Jones' accommodation, and that it belonged to Jones to pay the note. The defendant then sets up the statute of limitations, averring that the alleged demand in the complaint accrued more than six years before the commencement of the suit, &c. The plaintiff insists that this is a *sham* answer, and should be stricken out under § 152 of the Code.

MR. FARWELL, *for Motion.*

D. BROWN, *Opposed.*

BACON, Justice. There has been considerable discussion as to what is a sham answer or defence—some judges holding that the word is not synonymous with *false*, but applies only to cases where the answer takes issue upon some immaterial averment in the complaint, or sets up new and irrelevant matter; but I am inclined to accept the definition of Justice BARCULO, in *Nichols agt. Jones*, (6 *How.* 355,) that the essential element of a sham plea is its *falsity*, and that a false plea is necessarily a sham plea. But the falsity must be made clearly to appear, either necessarily and inevitably patent upon the very face of the pleading, or by uncontradicted affidavits of its falsity. Now I cannot perceive the inevitable falsity of the defence of the statute of limitations in this case. The defendant admits that he made the note, but denies the allegation that it was for his own benefit, and that he was bound to pay it. On the contrary, he asserts that he signed for the plaintiff's benefit, and upon him devolved the primary obligation to pay, and this is the issue raised by the answer.

He then adds as a further and substantive defence, that any

alleged cause of action and demand which the plaintiff sets up is barred by the statute of limitations.

The defence proceeds upon different grounds, but it cannot be said that one or the other is necessarily false. Suppose the defendant fails in establishing the fact that he asserts, that he signed for the plaintiff's benefit, shall he not be permitted to fall back upon the other ground and avail himself of that statute of repose which was intended to bar and defeat a cause of action, however perfectly it might otherwise exist, and be fully and entirely proved? This seems to me to be a reasonable conclusion, and I think the defendant cannot in this way be deprived of the benefit of this answer. Under the system of pleading as it existed before the Code, the practice of striking out false pleas was well established, and yet it was always allowed to plead the statute of limitations, with the general issue, and a motion to strike it out as a false or sham plea was never heard of. *Gra. Prac. 2d ed. 245.*

But the plaintiff further insists that the defence of the statute of limitations should be struck out as inconsistent with the other defence set up in the answer, and to sustain this position, he relies on the cases in 4 *Sand. S. C. R.* 664, 680, and 8 *How.* 356. In the first case it was held, that in an action of assault and battery, a defendant could not deny the assault and then add a plea of *son assault demerne*. In the second case, which was an action against a carrier, the court held that the defendant could not be allowed to answer first, that he was not the owner of the vessel, and secondly, that the property was delivered to the plaintiff. Now it should be remarked that there is no provision in the Code which allows answers to be struck out on the specific ground of inconsistency as such. It is only when it can be affirmed of an answer, that it is necessarily false, as standing connected or contrasted with another answer or defence on the same record, that a motion to strike it out is authorized, or can be entertained. This is substantially the ground upon which Justice *CARRER* proceeds in the case in 8 *How.* 356, in which he held, that where a defendant in an action of assault and battery and false imprisonment

Ostrom, receiver, &c., agt. Bixby.

denied the whole complaint, and each and every allegation thereof, he could not, as a further defence, set up new matter in justification of the alleged assault. They are not simply inconsistent—one or the other answer is false. “The denial of the assault and false imprisonment,” says Justice CRIPPEN, “cannot be reconciled with the new matter set up in justification. One or the other *is not true*.” Upon this ground those decisions may be maintained; but I should hesitate before carrying the rule any further than it can be applied to the case of an answer shown or conceded to be false. But in this case, I do not consider the defence of the statute of limitations as necessarily false. I cannot perceive why it may not stand as an additional and subsidiary answer; which, while not inconsistent with the issue raised by the other part of the pleading, may supplement the defence, and if not overcome by proof of payment, or a new engagement to pay, affords, of itself, a perfect answer to the action.

There is, perhaps, another and sufficient answer to this motion, arising from the fact that the answer in this case is *verified*. In the case of Mier agt. Cartledge, (4 *How.* 115,) a motion was made at special term to strike out the answer as false upon affidavits showing a state of facts entirely inconsistent with the truth of the answer. The motion was granted; but on an appeal to the general term, the decision was reversed on the ground, that if an answer or other pleading is *verified*, as required by the Code, a motion to strike it out as false cannot be entertained, (8 *Barb. S. C. Rep.* 75.) I confess I have some hesitation in fully subscribing to this doctrine, and the point should perhaps receive some further consideration before it is adopted as the settled practice of the courts of this state. (See opinion of BARCULO, 6 *How.* 355, and note at end of the case.)

I prefer, however, on this motion to place my decision on the grounds heretofore stated and discussed, and the result is, that the motion is denied; but as the point is now for the first time presented, under pleadings of the character of those in question in this case, and the application was not without apparent authority to warrant it, it is denied without costs.

SUPREME COURT.

SCHOOLCRAFT agt. THOMPSON.

SMITH and OTHERS agt. THOMPSON.

SMITH and OTHERS agt. THOMPSON.

A statement on confession of judgment without action (*Code*, § 383) was made as follows: "I do hereby confess judgment in this cause in favor of John L. Schoolcraft, for the sum of one thousand and twelve dollars and three cents, (\$1012.03,) and authorize judgment to be entered therefor against me. This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts: for goods, wares, and merchandise, sold and delivered to me by Messrs. Schoolcraft, Raymond, & Co., Albany, of which firm the plaintiff is a member; the goods were purchased by me in the years 1851 and 1852, and this judgment is confessed to said plaintiff, for the benefit of said firm of Schoolcraft, Raymond, & Co." Signed and verified by the defendant.

***Held*, that this was such a concise statement of the facts out of which the debt arose, as fully met the requirements of the statute. (*This decision reverses and overrules that made at special term and reported 7 How. Pr. R. 446.*)**

Seventh Judicial District, General Term, December, 1853.
Present, WELLES, STRONG, and JOHNSON, Justices. Appeal from order at special term setting aside the judgment in the first entitled cause as against the junior judgment creditors. (*See case reported 7 How. Pr. R. 446.*)

COLLINS & WILSON, for Junior Creditors.

CHAMBERLAIN & WOOD, for Schoolcraft.

By the Court—JOHNSON, Justice.—The judgment in favor of Schoolcraft was set aside at the special term upon the ground that the statute had not been complied with, in giving a statement of the facts out of which the indebtedness arose at the time of the confession, and as part of it. I find myself unable to concur with the learned justice who made the order at the special term in his view of the requirements of the statute. The terms of the statute are "a concise statement of the facts out of which it (the debt) arose." This could never have been intended to require a detailed statement of the transactions or dealings between the parties, or a bill of particulars. Under

the act of 21st April, 1818, which required a "*particular* statement and *specification* of the nature and consideration of the debt," to be signed by the party or his attorney, and filed with the confession; it was held that the statement must be as special and precise as a bill of particulars, and that nothing short of that would satisfy the language of the act. (Lawless agt. Hackett, 16 *John.* 149; Brinckerhoof agt. Marvin, 5 *John. ch.* 325.) In the latter case the chancellor remarks, that "all this accumulation of words shows that something more was intended than the common counts in a declaration for *goods sold* and *work done*." Had the legislature intended to require a statement of "the kinds of goods, wares, and merchandise, the qualities, the prices charged, the times, or near the times in the year when the purchases were made," as supposed by the learned justice, they would scarcely have expressed their intention in terms so brief and general. Such a statement, instead of being "a *concise statement* of the facts," would be a statement in detail, and nothing more nor less than a bill of particulars.

The facts out of which the indebtedness arose in this case, were the sales of goods, wares, and merchandise, by the plaintiff, or the firm of which he was a member, to the defendant. These are all clearly and concisely stated, and the time within which they occurred, so that no one can possibly mistake the nature of the transactions out of which the indebtedness is alleged to have arisen. And this, I think, is all the statement of the facts out of which the indebtedness arose, which the statute now requires. The time and nature of the transaction, and the consideration of the indebtedness, in concise and general terms, must be sufficient, unless a bill of particulars is required. We have here, 1. The amount of the debt confessed. 2. The allegation that it is a debt justly due. 3. That it was for goods, wares, and merchandise, sold and delivered to the defendant by the plaintiff's firm in the years 1851 and 1852; and, 4. The verification of the statement, by the oath of the defendant. This is in my opinion clearly sufficient. I agree with the justice at special term, that the general object and intent of the provision was to protect third persons from fraudulent judg-

ments, by furnishing them the means of detecting and defeating the fraudulent design. Hence, in addition to stating the amount of the indebtedness, and whether it was then due, or was thereafter to become due, and the facts concisely out of which it arose, the debtor is required to verify the statement by his oath. It is clear, I think, that all these provisions are not for the protection of the party confessing, but for that of his other creditors.

Under the act of 1818 the party was not required to verify his statement by his oath. The verification by the oath of the party obviates, in a great measure, the necessity of a *particular* statement and *specification*, and is a far more effectual safeguard against fraud. It is objected that the statement does not clearly and specifically allege that the whole amount for which judgment is confessed is due. That fact should clearly appear by the statement, and I am of opinion that it is stated with reasonable certainty in this case. The language admits of no other interpretation, than that the whole amount confessed is justly due. The verification is also sufficient. The distinction sought to be drawn between the confession and the statement is too narrow and technical to lay the foundation for setting aside a judgment. The order was not made at special term upon this ground. The confession embraces the whole statement upon which the judgment is entered. It is but a single instrument, and "the facts stated in the above confession" clearly refer to the facts which are stated as required by the Code to make it such a confession as to authorize the entry of a judgment upon it. I have no doubt whatever that a judgment entered up on confession in a manner not authorized by statute, may, and should be set aside, as fraudulent and void, as against subsequent judgments regularly obtained, upon application being made by the subsequent judgment creditors. It is true, that the Code does not declare such judgments void, as did the act of 1818, but the object and design of the provisions of the Code can be made effectual in no other way. There can be no doubt of the power of the court over its own judgments, when entered by confession without a compliance, substantially with the requirements of the statute. It is a power which courts have

always exercised in furtherance of justice and to prevent fraud. But as the statute was substantially complied with in this instance, the order setting aside the judgment was erroneous, and must be reversed.

WELLES, Justice, concurred; T. R. STRONG, Justice, dissented.

SUPREME COURT.

POST AND BALDWIN agt. COLEMAN.

A statement made on confession of judgment, (*Code*, § 383,) "that on the 3d day of November instant, the defendant gave the plaintiffs a promissory note for the sum of \$143,39, payable one day after date; that said note was given for a quantity of coal purchased of the plaintiffs for the use of the 'Brainard House,' that the defendant had been, and then was keeping." *Held*, that this was a sufficient statement of the facts out of which the indebtedness arose, to satisfy the requirements of the statute.

Where the confession declared the debt to be *justly due* to the plaintiffs, and although by the terms of the note it was not then *legally due*, yet the defendant made it so by the express terms of the confession of the judgment. The debt became *merged* in the judgment.

Where the defendant signed his name at the close or bottom of the *verification* which immediately followed the statement and confession of judgment instead of signing the statement, *held*, that it was a substantial compliance with the statute.

It is no valid objection to the regularity of such a judgment that the statement was verified before one of the *plaintiffs' attorneys*. This rule does not apply to affidavits preparatory to the commencement of a suit. There is no suit *pending* at the time of taking such an affidavit.

Otsego Special Term, Nov. 1858. Motion to set aside the judgment entered by confession in this action, for irregularity.

MR. HATHAWAY, *for Defendant.*

MR. KONKLE, *for Plaintiffs.*

CRIPPEN, Justice. The first ground relied upon is, that the statement in the judgment roll does not set forth the facts out of which the indebtedness arose with sufficient certainty or

particularity : and also that it does not show that the sum was justly due, or to become due.

The statute requires that the confession shall concisely state the facts out of which the indebtedness arose, and that the sum for which the judgment is confessed is justly due, or to become due. § 383 of *Code*, *sub.* 2.

The statement in the confession in this case sets forth, that on the 3rd day of November instant, the defendant gave the plaintiffs a promissory note for the sum of \$143,39, payable one day after date ; that said note was given for a quantity of coal purchased of the plaintiffs for the use of the "Brainard House," that the defendant had been, and then was keeping.

This plain, simple statement, it seems to me, is quite sufficient to satisfy the requirements of the statute. When the plaintiffs furnished the coal for the Brainard House, the defendant was the keeper of said house. The defendant gave his note to the plaintiffs for the coal thus furnished by them. It is true, the statement omits to say in direct and positive language that the defendant purchased the coal of the plaintiffs ; it is urged, therefore, that it might have been purchased by some other person than the defendant. No matter whether the defendant or some one else made the purchase, it was made for the use of the Brainard House, which the defendant had been, and was then keeping ; the plain, common sense and meaning, as well as the legal effect of which is, that the coal was purchased for the defendant, and that he, and no one else was liable to, or should pay therefor. The fact that he gave his note to the plaintiffs for the price of the coal is conclusive that it was purchased for the defendant. I entertain no doubt that the statement is sufficiently certain and specific.

The statement also sets forth that the judgment is confessed for a debt justly due to the plaintiffs, arising upon the following facts. Then follows the statement of the note given on the 3d day of November ; the amount thereof, the time when payable, and the facts out of which the indebtedness arose, as above mentioned. If the original consideration and the facts out of which the indebtedness arose sufficiently appear, then

the objection that the statement does not show that the debt was justly due to the plaintiffs must be unfounded. The defendant himself asserts it to be justly due to the plaintiffs in the present tense, not in the future,—that it will become due at some future period. It is insisted that the note described in the statement or confession was not due at the time the confession was made on the 4th day of November. The note bears date on the day previous; it was made payable on the 4th, the next day after its date. The law, beyond all doubt, gave the defendant three days of grace after the 4th day of November in which to pay the note. No one, however, will seriously contend that the defendant did not possess the power of changing the time of payment, and making the debt presently due. If the demand or indebtedness had continued to rest in the note, its payment could not have been enforced until the expiration of the days of grace; but the debt became merged in the judgment confessed subsequent to the giving of the note, and thereby made due immediately. The defendant could waive the time of payment fixed by the note, and make the debt due at once, or at any time when the parties might agree that it should fall due. The language used in the confession sufficiently shows that it was not the intention of the parties to secure a demand to become due at some future time. The confession declares the debt to be due, and justly due to the plaintiffs, and although by the terms of the note it was not then legally due, yet the defendants made it so by the express terms of the confession of the judgment.

The second ground of irregularity insisted upon is, that the statement in the roll is not signed by the defendant.

The statute requires that a statement in writing shall be made, signed by the defendant, and verified by his oath, &c. § 383 of Code.

Immediately after the statement of the defendant authorizing the entry of judgment, the amount, the facts out of which the indebtedness arose, and that the demand was justly due to the plaintiffs, follows the verification in the usual form, signed by the defendant, with the jurat of the officer.

It is urged and insisted that the defendant should have signed the statement above the verification, and also the affidavit.

After a careful examination of this point, I have very little doubt that the signature of the defendant to the verification or affidavit which follows the statement is a sufficient signing of the statement to answer the demands of the law. If the name of the defendant had been signed above the affidavit, and not below it, the verification would have been a legal one. An affidavit beginning with the name of the party making it, and appearing to have been duly sworn to, although not signed with the name of the party, is sufficient. *Haff agt. Spicer*, (3 *Caines*, 190;) *Jackson agt. Virgil*, (3 *Johnson's Rep.* 540.) According to these authorities, the affidavit did not require the signature of the defendant to make it legal; no instrument, therefore, requiring the signature of the defendant intervened between his signature and the statement of confession; the affidavit no doubt is sufficient without such signature. I am unable to perceive any good reason for deciding that the signature of the defendant at the close or bottom of the verification which immediately follows the statement and confession of judgment, is not a substantial compliance with the statute.

The third ground of objection to the regularity of the judgment is, that the statement on which the judgment is rendered was verified before one of the plaintiffs' attorneys.

The rule which excludes the attorney from taking the affidavit in an action is merely technical. This is the language of the chancellor in the case of *The People agt. Spaulding*, (2 *Paige R.* 327.) It has never in this state been extended beyond the case of the attorney on record. It must also be made before an attorney in a suit pending at the time. *Varey agt. Godfrey*, (6 *Cowen Rep.* 587;) it does not apply to affidavits preparatory to the commencement of a suit. The court refused to extend the rule to counsel in the cause. *Millard agt. Judd*, (15 *Johnson*, 531,) and in *Hallenbeck agt. Whitaker*, (17 *Johnson*, 2,) the court decided that the rule did not extend to the partner of the attorney on record, although he was interested in the profits of the business.

At the time the affidavit was made by the defendant before Mr. Konkle, no suit or action was pending. It does not affirmatively appear that the statement and affidavit were drawn up by Konkle after he or his partner were retained as attorneys to enter up the judgment.

The court is not called upon to indulge in mere inferences to make out a fact in order to sustain a technicality, where no fraud is charged and where no substantial right has been invaded.

At the time the affidavit was made before Mr. Konkle, no action had been commenced; he was not then the attorney of record of the plaintiffs, and there is no evidence that he was then even employed to act as the plaintiffs' attorney in perfecting a judgment on the confession.

My conclusion, therefore, upon this point, is, that it affords no sufficient reason for setting aside the plaintiffs' judgment.

The next and last ground for the motion is, that the execution issued on the judgment should be set aside, because the debt was not due at the time it issued.

This question has already been considered under the first point raised upon the argument; therefore, I shall spend no further time in again discussing it.

In any view that I have been able to take of the questions raised upon the argument, I have been led to the conclusion that the motion should be denied.

The clerk of Chemung County on filing the motion papers, is, therefore, directed to enter an order denying the motion, with \$10 costs.

NOTE.—It is stated in the note to Harlow agt. Hamilton and wife, and Moore, *How. Pr. R.*, 6 vol. p. 490, that in that case, "a motion was afterward made, under section 247, for judgment on account of the frivolousness of the answer, and was granted by the judge." The defendant, Anna Maria Hamilton, appealed from this judgment to the general term of the fourth district, and after argument, the judgment was reversed, at the St. Lawrence General Term, Sept., 1853.

Dean and wife agt. The Empire State Mutual Insurance Company.

SUPREME COURT.

DEAN AND WIFE agt. THE EMPIRE STATE MUTUAL INSURANCE
COMPANY.

The 349th section of the Code authorizes an *appeal* when the order *affects a substantial right*.

Now the question is this, Is such a substantial right violated, in *referring* a cause which involves the examination of a long account, where a party insists he has a right to have it tried by a *jury*, that he can *appeal* from the *order of reference*? *Held* not—Because, whether such a long examination will be involved is a question of fact to be determined summarily by the tribunal to which the application is made. If there be evidence enough to call for a judicial determination, it is a matter of discretion, and the decision must be regarded as conclusive

Albany General Term, September, 1853. WATSON, WRIGHT, and HARRIS, Justices.

Appeal from order of reference made at special term. The action was brought upon two policies of insurance executed by the defendants to Mrs. Dean. The property insured consisted of houses and personal property. The premises having been destroyed by fire, the plaintiffs claimed to recover \$2300 for the loss. The defendants denied that the property was of the value alleged. They also denied that Mrs. Dean was the owner. They alleged that the personal property belonged to the plaintiff, Noah S. Dean, and that he had made, in the application for insurance, false and fraudulent statements, which rendered the policies void.

The action being at issue, the plaintiffs, upon an affidavit of one of their attorneys, stating that the trial of the action would involve the examination of a long account, moved that the same be referred. The motion was granted. From this order of reference the defendants appealed.

D. WRIGHT, *for Plaintiffs.*

CH. S. LESTER, *for Defendants.*

By the Court—HARRIS, Justice.—If an order be made referring an action for slander, or assault and battery, or other mere wrong, it would undoubtedly be appealable. The last clause

Dean and wife agt. The Empire State Mutual Insurance Company.

of the third subdivision of the 349th section of the Code authorizes an appeal when the order affects a substantial right. The right to a trial by jury is such a right. It is guaranteed by the constitution in certain cases. If an attempt be made to deprive a party of such right in a case where it is thus secured, the order must be regarded as affecting a substantial right, and of course may be reviewed upon appeal.

But when the trial of an issue of fact will involve the examination of a long account, it may be referred. No right is violated by an order of reference in such a case; and whether such an examination will be involved, is a question of fact to be determined summarily by the tribunal to which the application is made. If there be evidence enough to call for a judicial determination upon the question, I suppose the decision should be regarded as conclusive. I do not think the court, upon appeal, should undertake to decide upon the weight of evidence. Having seen that a case is presented which might be referred, the question of right is disposed of, and all else is matter of discretion, and, of course, not to be reviewed upon appeal.

In this case, one of the plaintiffs' attorneys stated in his affidavit that the trial would necessarily require the examination of a long account. This was sufficient evidence to authorize the court, at special term, to find that fact, and having found it, it was then referred to the discretion of the court to determine whether the cause ought to be referred or not. Having decided, upon sufficient evidence, that the case was referable, and, being referable, that it ought to be referred, I think the decision of the special term ought not to be reviewed upon appeal. The order should therefore be affirmed with costs.

WASHINGTON COUNTY COURT.

DOUBLEDAY AND WIFE agt. NEWTON AND OTHERS.

The report of commissioners in *partition* will not be set aside only upon grounds similar to those upon which a verdict would be set aside, and a new trial granted. (4 *Edw. Ch. R.* 896.)

The affidavits of *four* credible and disinterested persons for, to *three* against setting aside such report, does not carry such a weight of evidence as to authorize the court to interfere to disturb the report.

Although the statute does not, *in terms*, require *notice* of the proceedings to be given to the parties in partition, (4 *How. Pr. R.* 133,) yet the necessity of such notice must be *implied*. For it is one of those adjudications of a judicial nature affecting the rights and interests of the parties, in which they have a *right* to substantial and beneficial *notice*, and without it the report of the commissioners will be set aside.

Washington County. Motion to confirm report of commissioners after an actual partition.

L. H. NORTHUP, *for Plaintiffs.*

CHARLES CRARY, *for Defendants, Blashfield and wife.*

GIBSON, County Judge.—The motion for the confirmation of the commissioners' report is opposed on two grounds.

1. That the partition made by the report is unequal and unjust.

The statute (2 *R. S.* 832) authorizes the court to set aside the report "on good cause shown;" and the construction given to the section has been the same as that given to the statute, conferring power upon the supreme court to set aside a report on assessments for street purposes in the city of New-York. The rule seems to be, that a report will be disturbed or interfered with by the court only upon grounds similar to those upon which a verdict would be set aside and a new trial granted. *Livingston agt. Clarkson*, (*Edw. Ch. R.* 896.) It is well settled that the report, in street cases, will not be set aside unless clearly against the weight of evidence, and "to induce to such a course, the facts should be of a very decisive character, and border strongly on the conclusive." Per COWEN, J. In the matter of Pearl-street, 19 *Wend.* 652.

It would be a very unsafe exercise of the discretion vested in this court, to disturb the report in question on any evidence now furnished in opposition to its confirmation. It is true, the affidavits of several credible and disinterested persons have been read, stating, that in their opinions injustice has been done by the partition; but, on the contrary, we have the report of the commissioners specially appointed for the purpose, duly sworn faithfully to examine the premises, and make and report a fair partition, in which they certify to a just and fair partition, quantity and quality considered. There are four affidavits against, and three in favor of the report, counting the report merely as the affidavit of the commissioners. And even if it stood thus, there is nothing to show that the report is so greatly against the weight of evidence as to authorize the court to set it aside. No court would set aside a verdict merely because four witnesses testified against, and but three in its favor. But the case stands on much stronger grounds than this. The report is made officially—by persons selected by the court, and not objected to by the parties—it is made after careful personal examination of the premises, and after exploring all the sources of information open to them; it is like a judicial act, and very different from the *ex parte* affidavits read in opposition to its confirmation. The commissioners are all of them well known to the court as freeholders, of great experience and approved integrity. To set aside their report merely because four other persons, of no greater means of knowledge, differ from them, would, in my view, be an abuse of discretion.

2. The second ground taken against the report is, that the party was not notified of the meeting of the commissioners, and did not attend.

On this ground the report must be set aside. It is a principle coeval with the existence of the common law, that no matter on which there is to be made an adjudication of a judicial nature affecting the rights or interests of a party, shall be heard in his absence, unless he has been duly notified. (4 *Bl. Com.* 288; *Cowen and Hill's notes to Philadelphia edition*, 998, and cases there cited. *Peters agt. Newkirk*, 6 *Cowen*, 103;

Elmendorf agt. Harris, 28 *Wendell*, 682, 688, per WALWORTH, Ch.)

This principle has been violated in the case under hearing. The party was not notified, did not attend, and had not the slightest knowledge of the proceeding.

The commissioners were not acting ministerially; on the contrary, their duties were of a judicial nature, to hear, examine, and determine; the matter to be determined affected the interest of the party now opposing more than a thousand dollars. The amount of the interest, however, is of no consequence on the question of the right to be heard or to notice.

The right is an important one, and should be fully protected by the courts, none the less because the legislative power has omitted to do so. If that were a reason why it should be denied, there would be slight protection to the rights of the citizen against the encroachments of power. Accident, error, or corruption, may confer power on boards or parties to pass upon the rights of third persons without notice; but the courts will always interfere and imply the necessity of notice from the judicial nature of the act.

I am referred to the case of *Row* agt. *Row*, (4 *How. Pr. R.* 188,) as an authority, that notice was not necessary. The court there say: "The statute does not require notice of the commissioners' proceedings to be given to the parties. For aught that is said by the statute, the commissioners may make partition without the actual knowledge of any of the parties. As, however, a technical notice is not required, I think the notice and attendance of one of the defendants, as shown in this case, sufficient." This decision is very far from showing that notice was unnecessary. It decides very clearly, and such is the syllabus of the reporter, that the statute does not require notice. The facts of the case show that notice had been given to one of the defendants, who attended, and the court place the decision on that ground.

It is conceded that under the statute a technical written notice is not required—but the party shall have substantial and beneficial notice—one which gives him time to be heard and opportunity to oppose.

The commissioners, within the case of *Kinderhook agt. Clow*, (15 *John*. 537,) "are to exercise a discretion and to decide after inquiring into all the circumstances of the case; and in every proceeding of such a nature, both parties are entitled to be heard, and notice to both is indispensably requisite." In the case last cited, the statute required no notice, and yet the court implied its necessity. And to the same point see the cases of *Smith agt. Gale*, (7 *Term. R.* 364,) and *Corlies agt. Corlies*, (8 *Verm. R.* 387 and 389.)

As there is nothing in the case tending to show the slightest impropriety on the part of the commissioners, but a mere omission, arising probably from there having been no decision settling the practice, it will be proper to refer the report back to them with directions to appoint a time and place on the premises, where they will meet and reconsider the matter, and all parties to have notice of such time previous as the commissioners shall direct. The fees and charges of the commissioners for such further proceedings as shall be had, to be reported, and to be paid in the same manner as those already incurred. The costs of the plaintiff on this motion, and of the party opposing, \$10 each, to be paid in the same manner as the costs in the action are directed to be paid under the judgment.

SUPREME COURT.

FULLER agt. SWEET AND OTHERS.

Where the plaintiff notices the cause for trial at the circuit, and by agreement of the counsel on both sides, it is set down for a future day in the circuit; and before that day arrives the jury are discharged and the circuit adjourns *sine die*, it is a waiver by the defendant of a motion for a dismissal of the complaint and for judgment, for not bringing on the trial by plaintiff previous to the cause being set down.

Steuben Circuit and Special Term, May, 1858. Motion on the part of defendants to dismiss complaint, and for judgment

Field agt. Hawxhurst and others.

as in case of non-suit, for not proceeding to trial at the Allegany circuit in April last.

S. HUBBARD, *for Defendants.*

R. L. BRUNDAGE, *for Plaintiff.*

WELLES, Justice.—The action was noticed for trial and placed upon the calendar by the plaintiff's attorney. On Friday of the first week of the circuit, the trial was, by agreement of the counsel, set down by the court for Tuesday of the second week, and so marked upon the calendar by the court. On Saturday of the first week, the jury were discharged, and on Monday following the circuit adjourned without day. This was a waiver on the part of the defendants of any default of the plaintiff in not moving on the trial previous to its being set down on Friday for the following Tuesday; and after it was so set down, there was no opportunity afforded the plaintiff for bringing on the trial. In this view, it is quite immaterial whether the plaintiff was in default for not trying the cause previous to setting it down for Tuesday of the second week.

The motion is therefore denied, with \$7 costs.

SUPREME COURT.

FIELD agt. HAWXHURST AND OTHERS.

It seems that a complainant in a foreclosure suit, under the 48th rule, is not required to establish beforehand all the claims he may have upon the mortgaged premises. He has the same right to present and establish a claim to the surplus moneys, as a defendant in the foreclosure suit, or any other person.

The court, in its discretion, has an extraordinary power, even after judgment, to allow a pleading to be amended by inserting new allegations, material to the case, but this power should be *sparingly exercised*.

Albany Special Term, April, 1858. Motion to amend complaint after judgment. The suit was brought to foreclose certain mortgages executed by the defendants Hawxhurst and

Paulding. The petition upon which this motion is founded, states, that on the 12th day of April, 1848, and while the mortgagors were yet the owners of the mortgaged premises, the plaintiff recovered against them, in the New-York Common Pleas, a judgment for the sum of \$7025,28, which was docketed in the county of Ulster, where the mortgaged premises are situated, and became a lien thereon. Subsequently, the equity of redemption in the mortgaged premises was assigned to a trustee for the benefit of creditors, who sold and conveyed the same to the defendant Ostrander.

The plaintiff states in his petition that when the complaint was drawn, he was advised by the counsel employed by him for that purpose, that it was unnecessary to set forth the judgment in the complaint, and it was therefore omitted; but that now he is advised that it is necessary, to enable him to claim satisfaction of the judgment out of the surplus moneys arising from the sale of the mortgaged premises.

It further appeared, upon the motion, that the cause, being at issue upon the answers of several of the defendants controverting the amount due upon several of the mortgages set forth in the complaint, was referred, and that the referees made a report upon the issues referred to them, and that the decision of the referees has been reviewed upon appeal to the general term of this court, but that no judgment roll has yet been filed. It is stated in the affidavits read in opposition to the motion, that the defendants are prepared to appeal from the judgment of the general term to the court of appeals, when such judgment shall be entered.

The motion was for leave to amend the complaint by inserting therein an allegation of the recovery of the judgment by the plaintiff; that the same was docketed, and became a lien upon the mortgaged premises, and is yet wholly due, and unpaid.

M. SCHOONMAKER, for Plaintiff.

S. SHERWOOD, for Defendant, Ostrander.

HARRIS, Justice. I am inclined to think the amendment

sought by the plaintiff is unnecessary for the purpose for which it is asked. Prior to 1830, it was the practice to ascertain the amount of all incumbrances upon mortgaged premises, before making a decree for sale. Renwick agt. Macomb, (*Hopk.* 277.) The 136th rule, adopted in 1830, dispensed with the necessity of ascertaining, beforehand, the liens of the defendants. If any surplus moneys remained "after satisfying the amount due the complainant, *any defendant* might have an order of reference, &c." Still it was necessary that the complainant should set out in his bill all his claims upon the mortgaged premises. Town agt. White, (10 *Paige*, 395.) But in 1844, the year after the decision in Town agt. White, the 136th rule was amended so as to allow "*any party to the suit*," or any person not a party, who had a lien on the mortgaged premises at the time of the sale, to have an order of reference, to ascertain the priorities of the liens. The 48th rule of the court, now in force, contains the same provision. The very object of the alteration made in 1844, and which has continued unchanged until the present time, was, to save the complainant from the necessity of establishing beforehand all the claims he might have upon the mortgaged premises. As I understand the rule, it was intended that the complainant should have the same right to present and establish a claim to the surplus moneys as a defendant in the foreclosure suit, or any other person. I regard it, too, as the more convenient practice.

But, whether I am right in this construction of the rule or not, I think this motion ought not, at least in the present stage of the suit, to be granted. I know that the court may, in its discretion, even after judgment, allow a pleading to be amended, by inserting new allegations material to the case. This is an extraordinary power, and should be sparingly exercised. If the amendment is allowed, it would be necessary that the defendant should have the opportunity to controvert the new allegations. This, I suppose, from what I know of the character of the controversy, they would be very likely to do. If so, it would involve the necessity of vacating all that has been done since the reference of the former issues, or a separate trial of

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the new issues. Neither, in my judgment, would be proper at present. The motion must, therefore, be denied, with costs, but without prejudice to the right of the plaintiff to renew it, if he shall be advised so to do, after the sale of the mortgaged premises.

SUPREME COURT.

WOOD agt. ANTHONY.

Where a party seeks to take advantage of an irregularity by which he could not be prejudiced, he must act *promptly*.

It may well be doubted whether, what was formerly called the *money counts*, are proper to be inserted in a complaint under the Code. (*See Blanchard agt. Strait*, 8 How. Pr. R. 83, *expressing similar views*.)

A motion to *set aside* a complaint, because the causes of action are not separately stated (§ 167) and plainly numbered, (*Rule 87*), is not proper; because, the object of that section and the rule was to make the pleading definite and certain; and when a pleading is indefinite and uncertain the remedy is by motion under § 160, to make it definite and certain by *amendment*. (*Disagrees with the decision upon this point in 8 How. supra.*)

Montgomery Circuit, December, 1853. Motion by defendant to set aside complaint. The facts sufficiently appear in the opinion of the court.

MITCHELL & ELY, *for Motion*.

J. D. GROS, *Opposed*.

CADY, Justice.—The plaintiff, in what may be called the first count in his complaint, has stated all the facts constituting a cause of action against the defendant for \$216,67, and interest since the 15th November, 1848; after which he has added, what under the old practice was called a money count; he, however, neglected to number the different causes of action, as is required by the 87th rule of the court. The complaint was served by mail on the 29th day of August, 1853, and on the 6th day of October, 1853, being the thirty-ninth day after the service of the complaint, the defendant's attorneys obtained an order

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from Mr. Justice MARVIN, staying the proceedings on the part of the plaintiff until the 21st day of October last ; and that the plaintiff should then show cause before the said justice at his chambers in Jamestown, in the county of Chautauque, why the proceedings should not be further stayed, until a motion to set aside the complaint could be made at a special term to be held at Fonda, in the county of Montgomery, on the fourth Monday in November then next. And as the motion could not be made until the 5th of December, 1853, the plaintiff was delayed fifty-nine days after he was entitled to an answer. And after the complaint was served, and before the motion was made, there were nine special terms at which the motion might have been made.

These facts show that the defendant was not unwilling to delay the plaintiff. And upon what grounds does he now move to set aside the complaint? On the ground that the several causes of action set forth therein are not separately stated and plainly numbered, as required by the 87th rule of this court ; and also on the ground that the complaint is indefinite and uncertain. These objections are technical, and when a party seeks to take advantage of an irregularity by which he could not be prejudiced, he should act promptly. Nichols agt. Nichols, (10 *Wend.* 560.)

The defendant's delay in this case has probably been much more prejudicial to the plaintiff, than the plaintiff's irregularity could possibly have been to the defendant. Upon that ground the motion ought to be denied with costs. But that is not the only ground upon which the motion may be denied. The object of section 167 of the Code, requiring the causes of action to be separately stated, and of rule 87, requiring them to be plainly numbered, was to render the pleading definite and certain ; and when a pleading is indefinite and uncertain, the proper remedy is, by motion under § 160 of the Code, for an order to make the pleading definite and certain by an amendment.

It may well be doubted, whether what may be called the money count in the complaint is warranted by the Code. On that point I agree with the opinion expressed by Mr. Justice

CRIPPEN, in Blanchard agt. Strait. (8 *How. Pr. R.* 83.) In that case the motion was to set aside the plaintiff's pleadings for irregularity; also to strike out portions of the complaint for redundancy; and also to require the plaintiff to make the complaint more definite and certain. Justice CRIPPEN set aside the complaint on two grounds; one of which was, that the 87th rule had not been complied with. I cannot agree that that was good cause for setting aside the complaint; the defect would have warranted an order to make the complaint more definite and certain; the other ground upon which the complaint was set aside, does not exist in this case.

In this case the defendant might have had an ample remedy upon a motion for an order directing the plaintiff to make his complaint more definite and certain; and as he has asked for a remedy to which he is not entitled, his motion must be denied, with \$10 costs.

SUPREME COURT.

ESTUS, Respondent, agt. BALDWIN, Appellant.

Where the judgment of the appellate court is given for the appellant absolutely and finally, no new trial being ordered, it is imperative upon the court to order *restitution of all the appellant has lost*. (*Code*, § 330.)

Therefore, in a case where the judgments of the justice and the county court are reversed, complete restitution cannot be made to the appellant, short of paying him his costs of defending the action before the justice, and of prosecuting the appeal before the county court, together with his costs in this court.

Where the judgment of the appellate court is in favor of the moving party, whether appellant or plaintiff in error, the statute 2 *R. S.* 617, § 24, which has been held not to be repealed by the Code, and 1 *R. S.* 324, § 6, does not give *double or treble costs*.

Livingston Circuit and Special Term, Oct. 1853. Motion on the part of appellant for an order directing the clerk of Livingston County to adjust, and insert in the judgment, treble costs before the justice, in the county court, and in this court.

Estus agt. Baldwin.

Estus sued Baldwin before a justice for taking personal property, and recovered judgment, which was affirmed on appeal to the county court of Livingston County: on appeal to this court, the judgment of the county court and that of the justice were reversed. The trespass complained of was justified by Baldwin, who was a constable, under a warrant issued by the president of a court martial, to collect a military fine.

AMOS DANN, *for Motion.*

CHARLES C. WILSON, *Opposed.*

WELLES, Justice. The judgment of this court at general term, on the appeal from the county court, reversed the judgments both of the justice and the county court; and its effect was to restore the appellant to all things which he had lost by occasion of those judgments. Section 330 of the Code declares, among other things, that "when the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment." Although the language of the section is "*may* make restitution," &c., I entertain no doubt that the true construction is, to *require* the appellate court to make such restitution in all proper cases. There is a class of cases where it would or might be improper to order restitution; such, for instance, as where the judgment appealed from is reversed and a new trial granted. In such case, the court has a discretion in relation to granting costs, and as the judgment is not final, there is no restitution to be ordered. But where the judgment of the appellate court is the end of the action, and no new trial is ordered, I think it is imperative upon the court to order restitution of all the appellant has lost; and, in a case like the present, where the judgment of the justice and the county court are both reversed, complete restitution cannot be made, short of paying him his costs of defending the action before the justice and of prosecuting the appeal before the county court.

My opinion, therefore, is, that the appellant Baldwin is en-

titled to his costs, as well before the justice and in the county court, as in this court; and that they be all adjusted by the clerk of Livingston County, upon proper notice, and inserted in the judgment of this court.

The only remaining question is, whether the appellant is entitled to have his costs trebled under § 6, *tit.* 9, *ch.* 10, *part* 1 of the *Revised Statutes*, (1 R. S. 824, § 6.) It has been held, and I think may now be regarded as the settled practice of the court, that under section 24, (2 R. S. 617,) which has been held not to be repealed by the Code, a successful *plaintiff in error* is not entitled to have his costs doubled. Dockstader agt. Sammons, (4 *Hill.* 546;) Foster agt. Cleavland and others, (6 *How. Pr. R.* 253.) In Foster agt. Cleavland, the rule was with much good sense, as I think, applied by Justice HAND to an appellant. The principle seems to be, that where the judgment is in favor of the moving party, whether appellant or plaintiff in error, the statute does not give double costs. The section under which treble costs are asked for in this case, (1 R. S. 824, § 6,) although somewhat differently worded from the section giving double costs, (2 R. S. 617, § 24,) yet with respect to this precise question, viz. whether a successful appellant or plaintiff in error is entitled to the benefit of the provisions giving double or treble costs, they should, it seems to me, receive the same interpretation.

It follows, that the motion for treble costs must be denied. But as this is the first time that the question has been presented in this aspect for adjudication to my knowledge, no costs are allowed for opposing the motion.

Sipperly and others agt. The Troy and Boston Railroad Co.

SUPREME COURT.

SIPPERLY AND OTHERS, Commissioners of Highways, of the town of Schaghticoke agt. THE TROY AND BOSTON RAILROAD CO.

Where the plaintiffs in the *first* and *third* counts in their complaint set out their facts constituting a cause of action under the general railroad act, (Laws, 1850, p. 224,) for damages, by reason of a failure of the defendants in making their railroad to restore certain highways to their former state, &c.; and in the *second* and *fourth* counts upon substantially the same facts, claimed treble damages of the defendants for injuries to the highways under the Revised Statutes, (1 R. S. 526, § 130,) the *first two* framed for obstructing one highway, and the *last two* for obstructing the other. *Held*, that the plaintiffs could not for the same act, and upon substantially the same facts, recover under both the above-mentioned statutes. Consequently there was an *unnecessary repetition* in the complaint.

On account of doubts as to the sufficiency of either set of counts in case the others were stricken out, the whole complaint was set aside.

Rensselaer Special Term, April, 1853. Motion to set aside complaint for irregularity, or to strike out a part of the counts. The action was brought by the plaintiffs, as commissioners of highways. The defendants' road, as it appeared from the complaint, crosses two highways in the town of Schaghticoke, one of which is described as the highway leading easterly from the Schaghticoke and Lansingburgh turnpike, near the dwelling house of John Cooper, to a public highway near the dwelling of Orman Doty; and the other, as a highway leading from Schaghticoke Point past the dwelling house of Orman Doty to the northern turnpike. The complaint alleged that the defendants, in the construction of their railroad across these highways, had unnecessarily created, and left unremoved, a high embankment across such highways, and had neglected and refused to restore the highways to their former state, or to such state as not unnecessarily to have impaired their usefulness. The complaint contained *four* counts, the *first two* of which related to the obstructions created in the first of the highways above men-

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tioned, and the *other two*, to the latter highway above mentioned. The questions arising upon these four counts will sufficiently appear in the opinion of the court.

T. C. RIPLEY, *for Plaintiffs.*

A. B. OLIN, *for Defendants.*

HARRIS, Justice.—By the 5th subdivision of the 28th section of the general railroad act, (*Sess. Laws*, 1850, p. 224,) the defendants were authorized to construct their railroad across these highways; but they were also required “to restore the same to their former state, or to such a state as not unnecessarily to have impaired their usefulness.” It is upon the failure of the defendants to perform this duty that the *first* and *third* counts of the complaint seem to have been framed.

By the Revised Statutes it is declared, that “whoever shall injure any highway, &c., shall for every such offence forfeit treble damages.” (1 R. S. 526, § 130.) The *second* and *fourth* counts of the complaint are framed with a view to recover the damages contemplated by this act. The facts in the two sets of counts are substantially the same. This is “*unnecessary repetition.*” The plaintiffs cannot, for the same act, recover for the failure of the defendants to perform their duty under the provision of the railroad act already noticed, and also treble damages under the Revised Statutes. In short, the plaintiffs, upon their own showing, have but two causes of action, and yet these are put forward in the complaint, and the defendants are required to defend themselves, as though there were, in fact, *four* distinct causes of action, upon which the plaintiffs expected to recover. This cannot be regarded as a statement of the facts constituting the plaintiffs’ causes of action *without unnecessary repetition.*

The chief difficulty I have had in the decision of the motion relates to the form of the order which should be made. I was at first inclined to think that the *second* and *fourth* counts should be stricken out, because it seemed at least doubtful whether the defendants could be made liable for the treble damages imposed by statute for an injury to a highway. But, on the other

Petition of Ann Fero and David Fero.

hand, there may be some doubt whether the plaintiffs can maintain an action to recover damages for the failure of the defendants to restore the highways to their former state. (See Cornell agt. The Batternutts and Oxford Turnpike Company, 25 *Wend.* 865; Cornell agt. The Town of Guilford, 1 *Denio*, 510.)

Under these circumstances, instead of striking out two of the counts, or requiring the plaintiffs to elect which of the counts they will retain, I think it better for the plaintiffs that the complaint should be set aside altogether, so that they may have an opportunity to state their case anew, and, if possible, avoid the difficulties to which I have referred. The order will so direct. The plaintiffs must be charged with the costs of the motion.

NOTE.—This order was affirmed, upon appeal, at the Albany General Term in December, 1853.

SUPREME COURT.

In the matter of the petition of ANN FERRO and DAVID FERRO.

Where property, real and personal, is conveyed by the *cestui que trust* in trust, to pay him the income annually during his life, and at his decease to release or convey the estate to his heirs at law, the *capital* of the trust estate cannot be invaded, even for necessary articles of furniture and clothing for the *cestui que trust*.

Albany Special Term, August, 1853. Application for order directing the trustee of Ann Fero to invest of the trust fund in his hands, for her use, the sum of \$200 for furniture, and \$100 for clothing and bedding.

E. F. BULLARD, *for Petitioners.*

CHARLES CRAMER, *Opposed.*

WRIGHT, Justice.—If the necessity for this investment was rendered fully apparent by the facts disclosed in the petition (which it is not) I should doubt the power of the court to grant the order. The *cestui que trust* has parted with all interest in the capital of the trust estate. The trust is two-fold, to pay to

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to enter in the judgment book, which it is his duty to keep among the records of the court. (§ 279, 280.)

Immediately on entering the judgment, unless the party or his attorney shall furnish the clerk a judgment roll, he is required to attach the summons, pleadings, and copy of the judgment, with the verdict, together, and file the same, which shall constitute the judgment roll. (§ 281.)

A strict compliance with the foregoing provisions of the Code would seem to make it the duty of the clerk to enter a judgment on the verdict, and make up and file a judgment roll *immediately* on receiving the verdict, unless otherwise ordered by the court. This, however, is not so regarded, and is not so practiced. In practice the judgment roll is not usually made up and filed until the costs are adjusted, and the party is prepared to have the judgment perfected and docketed.

We do not consider the provisions of the Code regulating the mode of entering the judgment, the making up and filing a judgment roll, as imperative, but as merely directory. Previous to actually docketing the judgment, the prevailing party may have his costs inserted in the judgment upon two days' notice to the other party. The language of the Code is, "that the clerk shall insert in the entry of judgment on the application of the prevailing party upon two days' notice to the other, the sum of the charges for costs, including the fees of officers and necessary disbursements," &c. (§ 311.) The language of this section clearly indicates that the judgment has been entered. The clerk is directed to insert the costs in the entry of the judgment, not to insert the costs and then enter the judgment. On a careful examination of the provisions of the Code, it seems to contemplate the entry of the judgment in the judgment book, and the making up and filing the judgment roll prior to the adjustment of the costs and the insertion thereof in the judgment. In conformity with this view of the law, a provision is made for the interest which may accrue on the verdict from the time it is rendered until judgment is finally entered thereon; the clerk is required to compute the interest and add it to the costs of the party entitled thereto. (§ 310.) The Code

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also directs, that on filing a judgment roll upon a judgment, it may be docketed with the clerk of the county where it was rendered. (§ 282.) This section is entirely in harmony with the preceding sections: it does not require that the judgment shall be docketed at the time of filing the judgment roll; it merely provides that it may be done. Nothing appears in the papers on which the motion was founded, going to show any irregularity in the entry of judgment, or in making up and filing the judgment roll. So far the proceedings on the part of the plaintiff appear to have been entirely regular. It follows, therefore, that the order setting aside the entry of judgment is unauthorized and should be reversed.

As to the next question raised upon this appeal, there is no doubt that the costs were irregularly adjusted and inserted in the judgment. No notice of the application to the clerk to insert the costs in the entry of judgment was given to the defendant's attorney, as required by section 811 of the Code.

- If, however, the judgment was properly entered and is allowed to stand, then there is no possible necessity or excuse for setting aside the docket of the judgment and subsequent proceedings. Ample justice may be done, and the defendant's rights fully protected without taking that step. If the docket is set aside, the plaintiff will be deprived of the security which he may have acquired by that proceeding. Unless the irregularity is such as to partake of the essence of the act of docketing the judgment, it should not be regarded as affecting its validity. It is undoubtedly the duty of the party entitled to costs, to give the other party two days' notice of the application to the clerk to have such costs inserted in the entry of the judgment. It is equally the duty of the clerk not to adjust or insert the costs in the entry of judgment until such notice has been given. The plain language of the Code requires the clerk to insert in the entry of judgment on the application of the prevailing party, upon two days' notice to the other, the sum of charges for costs, &c.

The essence of the thing required to be done, is the insertion of the costs in the entry of the judgment, and not the no-

tice of the application to have it done. The statute in such a case should be regarded as merely directory and not as imperative. A statute which directs a thing to be done in a certain time without any negative words restraining its being afterward done, will, as a general rule, be regarded as directory, and not as a limitation of authority. (*Smith's Commentaries*, § 670.) Pond agt. Negus, (3 *Mass. Rep.* 282.)

There are no negative words used in the provisions of the Code, restraining the clerk or rendering void his acts, in case the costs are adjusted and inserted by him in the entry of judgment without the required notice to the other party.

It is an obvious principle that prevails in the construction of statutes to carry into effect the intent of the legislature, and to secure the object intended to be secured by the statute.

The substance of the thing to be done by the clerk is the insertion of the costs in the entry of judgment; the notice to the other party is merely collateral to the principal act. The object of the notice is to protect the party against the allowance of illegal and unjust charges; but if the notice is omitted to be given, it does not affect the essence of the act required to be performed by the clerk, to wit, the insertion of the costs in the entry of judgment. The clerk is substituted, by the Code, in the place of the taxing officer, under our former system; if he finds illegal items in the bill of costs presented for adjustment, it is his duty to strike them out. Belding agt. Conklin, (4 *How. Pr. R.* 199.) Justice BARCULO holds in this case that the clerk is a substitute in the place of the taxing officer, and although the word "tax" is no longer used, the substance of the duty remains the same as before the Code. Under our former practice, an irregular taxation never was allowed to affect the regularity of the judgment. (7 *Cowen Rep.* 412; 2 *Wend.* 244; *Graham's Practice*, 2d ed. 288.) If the clerk irregularly adjusts the costs and inserts the same in the entry of judgment, no good or well-founded reason can be discovered why it should any more affect the regularity and validity of the docket of judgment now than it formerly did.

If the statute directing the notice of adjustment to be given

is merely directory, and not imperative, as we have no doubt it must be, it then follows that the act of adjusting the costs by the clerk does not depend for its validity on the giving of the notice by one party to the other. The power or authority of the clerk to perform the act, is not conferred by the notice, but by the law itself.

The remedy of the party entitled to have the notice of adjustment and insertion of the costs in the entry of judgment, may safely rest, in the right to compel a readjustment at the expense of the party who shall obtain such insertion and adjustment, without giving the notice required by § 811 of the Code.

Justice GRADLEY, in the case of Richards agt. Sweetzer, (4 *How. Pr. R.* 414,) decided that a judgment is not irregular or liable to be set aside because the two days' notice of the application to the clerk to enter the costs in the judgment were not given.

Also the same learned jurist, in the case of Dix agt. Palmer and others, (5 *How. Pr. R.* 284,) comes to the same conclusion on a review of the cases.

We are aware that in the case of Mitchel agt. Hall (7 *How. Pr. R.* 490) it was held by Justice BARCULO that the clerk had no authority to adjust the costs until the notice of two days was given. This case holds that it is the notice which confers authority on the clerk. It is remarkable if the legislature intended to attach so much potency to the giving of the two days' notice, that they did not indicate it by some express words in the act. If it was intended that the authority of the clerk should depend upon the giving of notice to the opposite party, proof of its having been given should be made to the clerk, otherwise he ought not to insert the costs in the judgment. We do not concur in the opinion of the learned justice, that the clerk derives his authority to insert the costs in the entry of judgment from the giving of the two days' notice. Before the Code was made, the taxation of costs without notice was an irregularity, because it violated a standing rule, and the practice of the court. The adjustment of costs and the insertion in the

entry of judgment by the clerk without notice, is now an irregularity, because it violates the requirement of § 811 of the Code. We are of opinion that the clerk's authority is not derived from the act of giving the notice. If the clerk adjusts the costs and inserts the amount in the entry of judgment without notice to the other party, it can only be regarded as an irregularity of the party, not affecting the authority of the clerk or the validity of the judgment. The only consequences arising from such irregularity are, to order a readjustment of the costs at the expense of the party omitting to give the notice, and to compel such party to pay the costs of a motion to obtain a readjustment.

It is obvious that many times a delay of two days in docketing a judgment will entirely defeat the party recovering a verdict from collecting any portion of it; ample time will thus be given to create liens and shifts of property, by which the vigilant creditor may be entirely defeated in obtaining the fruit of his litigation. If the party obtaining a verdict desires to enter and docket his judgment without delay, for the purpose of reaching the property of his adversary, and thereby securing the demand, we are unable to discover any prohibition in the Code taking away the right to do so. The former practice allowed the party to enter a judgment and give notice of a re-taxation of the costs. We see no good reason to change the practice in that particular.

On the whole case, therefore, we are of opinion that the order of the special term must be reversed, but without costs to either party.

Justice GRAY gave no opinion.

SUPREME COURT.

BROWN AND OTHERS agt. TRACY.

A *sheriff* is liable for an *escape*, where the *prisoner*, upon a warrant of a police justice, is taken from the custody of the sheriff to answer an alleged crime—the prisoner being at the time charged in execution upon final process.

At Chambers, Penn Yan, Feb. 1854. Demurrer to answer submitted by stipulation of counsel. The action is brought against the defendant as sheriff of Seneca county for the escape of one George Gilbert, who was charged in execution upon final process. The answer demurred to is sufficiently stated in the opinion which follows.

D. HERRON, *for Plaintiffs.*

A. T. KNOX, *for Defendant.*

WELLES, Justice. I incline to the opinion that the facts stated in the answer demurred to in this case are not sufficient to constitute a defence. George Gilbert, for whose escape the sheriff is prosecuted, was charged in execution upon final process, and was in actual custody. The substance of the answer to which the demurrer is interposed is, that Gilbert was afterward arrested by virtue of a warrant issued by a police justice of the city of New-York, on a charge against him for obtaining goods by false pretences, and that he was taken to the city of New-York before the police justice, and by him committed, after examination, to close confinement in the prison of that city, where he still remains; and that such arrest and imprisonment were without the assent and against the will of both the sheriff and Gilbert, which is the same escape alleged in the complaint. The arrest under the warrant of the police justice was unlawful, and being so, it was a rescue of Gilbert from the sheriff's custody, which is no defence to the sheriff in an action for an escape of a debtor confined on final process. (*Bac. Abr. Rescue, (E.) vol. 8, p. 589; Phila. ed., published by Thomas Davis, 1846.*)

I say the arrest was unlawful because, Gilbert being charged in execution, was in the custody of the law, and could not be

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lawfully taken from the sheriff by virtue of the warrant in question. The sheriff had the power to prevent it, and failing to exercise it, is liable as for an escape. The jail liberties, as established by law, are, in legal contemplation, only an extension of the four walls of the prison. The sheriff was not bound to give the prisoner the limits of such liberties without sufficient bail that he would not go beyond them. Whether bail is given or not, he is equally in the sheriff's custody. If Gilbert had been locked up in jail, in *arcta custodia*, no one, I apprehend, would contend that it was the duty of the sheriff to surrender him to the officer holding the warrant for his arrest, issued by the police justice; and the fact that he was not so locked up, but was allowed the liberties of the jail, can make no difference in the legal posture of the question; for, as before remarked, he was still in custody. It does not appear whether he had given bail for the limits. If he had not, it was at the option of the sheriff to allow him the privilege of such limits, being responsible if he went beyond them, and not otherwise. The bail in such case is for the sheriff's indemnity only. If sufficient bail is tendered, the prisoner is entitled to the limits. The bail bond is substituted in the place of an actual physical wall on the line of the liberties for the protection of the sheriff. If he had the right to detain the prisoner as against the police justice's warrant, then the arrest set up in the answer was as much a rescue as if he had been taken away by a mob.

The sheriff's liability for an escape of a person charged in execution is exceedingly severe. It is likened to that of a common carrier, where nothing, it is said, will excuse from a literal and strict performance, but the act of God or the public enemy. Fairchild agt. Case, (24 *Wend.* 381, and authorities there cited.)

There must be judgment for the plaintiff on the demurrer. I see no reason for allowing the defendant to amend this answer. There is no objection to the manner or form of the pleading. If I am correct, it is bad in substance, and cannot be made good by amendment. The answer is one of several defences

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interposed. Judgment for the plaintiff on this demurrer, of course does not interfere with the others. If the remaining issues upon the record do not present all the questions which ought to be raised for the purpose of a fair trial, the court doubtless has power on motion, upon a proper case being presented, to allow the defendant to set up other and further answers.

COURT OF APPEALS.

SACKER'S HARBOR BANK, respondent, agt. **BURWELL AND ANOTHER**, appellants.

If this court have the power to review a decision of the supreme court, denying an application to order an amended answer to stand as part of the pleadings in the cause, it can only be exercised after a final judgment in the action.

January Term, 1854. This was a motion on the part of the appellants, to set aside an order of the respondent dismissing the appeal under rule 2, and for leave to file the clerk's return.

It appeared that the defendants answered originally, by denying each and every allegation of the complaint. That subsequently the defendants served amended answers, alleging new matter by way of defence, which the plaintiff's attorney refused to receive, on the ground that the defendants could not amend an answer which did not admit of being replied to according to section 172 of the Code.

The defendants then moved at circuit special term for an order that the amended answers be received by the plaintiff's attorney and treated as a part of the pleadings in the action, or that the cause be stricken from the calendar. Mr. Justice HARRIS, holding the circuit, denied this motion. An appeal was taken to the Erie general term, where the order at special term was affirmed. The defendants then appealed to this court. The return of the clerk below not having been filed in

season, an order was entered by the respondent dismissing the appeal under rule 2. The defendants then made this motion, when the merits of the appeal in its present shape were discussed.

N. HILL, jr., for the appellants.—Insisted that the right to amend the answer within twenty days, under § 172 of the Code, was an *absolute right*, whether the answer sought to be amended set up new matter, or counter claim, or not; and that the decision of the court below was erroneous in this respect: that it was a right given by statute, which the supreme court had no control over, and was not, therefore, a matter of *discretion*, like an ordinary matter of practice.

That if this court could not hear it on this appeal, they could not on any appeal, as the papers on which the motion was made and denied would not go into the record, and would not, therefore be brought by appeal from the *final judgment*.

GEO. F. COMSTOCK, *for Respondent*.

JOHNSON, Justice.—It is unnecessary for us to say whether in any case we can be called upon to review a decision of the supreme court denying an application to order an amended answer to stand as part of the pleadings in the cause. For if we have any such power, it can only be exercised after a final judgment in the action. No judgment appears to exist in this case, and neither of the subdivisions of § 11 of the Code of procedure is broad enough to give us the right to review this decision, until final judgment shall have been rendered, even if we have the power to review such an order after final judgment. Upon this last question we express no opinion.

As the appeal, if reinstated, would on motion be dismissed, to grant the present motion could answer no useful purpose, and it must therefore be denied with \$10 costs.

SUPREME COURT.

THE PEOPLE, *ex rel.* PEASE agt. KING.

Where a defendant disobeys an *order* made by a judge for the non-payment of a sum of money directed to be paid, the *precept* issues to commit directly. The process to *appear* and *answer* is for contempts other than those for the non-payment of a sum of money.

Where an order is made that the defendant pay a sum of money *in satisfaction of the judgment*, he is not in *contempt* for not paying the sum to the *receiver* on demand of the latter; because the order is not to pay the money into court, or to the receiver, but in effect, to pay to the plaintiff directly in satisfaction of the judgment.

Whether an order discharging a defendant from attachment for contempt in not paying over money, pursuant to an order, is *appealable*, *very doubtful*.

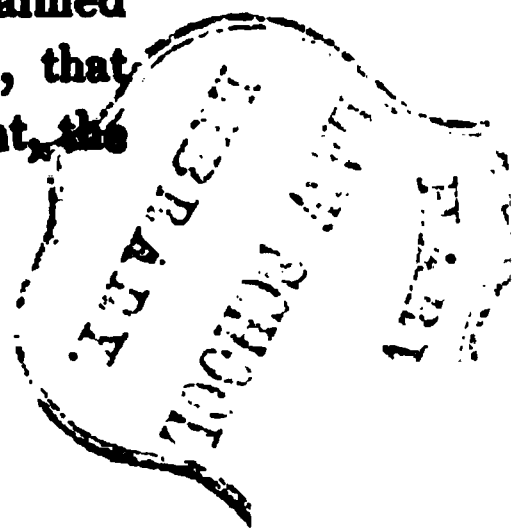
In supplementary proceedings, where the funds are in the hands of the defendant, and there is no *dispute as to the ownership*, and it appears clearly that the funds belong to the defendant, it is proper to make an order to pay the money or apply it *directly in satisfaction of the judgment*. But where the title to the funds in the hands of the defendant are in *dispute*—claimed by persons other than the defendant, such an order is improper; the judge, under the authority conferred by sections 292 and 293 of the Code, has no right to try and determine in this summary manner these conflicting claims.

The proper order in such case is to restrain the defendant from paying over the funds to any person, and to appoint a *receiver*, whose duty will be to apply for an order requiring the defendant to pay the money into *court*, when all the parties can be heard, and the controversy disposed of.

Seventh Judicial District, General Term, Dec. 1858. Appeals from three orders made by the county judge of Monroe county in proceedings supplementary to execution.

The judgment upon which the execution issued was in the supreme court, and in favor of the relator against the defendant.

On the examination of the defendant before the referee, it appeared that he had then in his hands about \$279, which he claimed to hold as the money of one Woodworth, and as being the proceeds of property alleged to belong to the latter, which the defendant had sold as his agent. Woodworth was also a witness, called by the relator before the referee, and claimed the money as his. It appeared from the examination, that after the relator commenced his suit, and before judgment, the



defendant claiming to be indebted to Woodworth for borrowed money, and to other persons in different sums, confessed judgment in favor of Woodworth and the others separately before a justice of the peace, and consented the executions might issue immediately. Executions were accordingly issued, and all the defendant's personal property levied upon and sold at a constable's sale. The property consisted of stock upon the farm, crops growing, and farming utensils. Woodworth bid off upon the sale in satisfaction of his execution a crop of oats and a crop of beans then growing, and it was agreed between him and the defendant that the latter when the crops were ripe should harvest, thresh, and market them, and take pay for his labor and trouble out of the proceeds, and pay the balance over to Woodworth. The balance was this \$279, which both Woodworth and the defendant claimed to belong to the former.

The examination before the referee was on the 29th of October, 1853. On the 5th of November following, upon the report of the referee of the evidence taken upon the examination, the county judge made an order directing the defendant to apply the amount so in his hands toward the satisfaction of the judgment. He also, by order, appointed a receiver. On the 7th of November, the receiver demanded the money of the defendant, upon the order directing it to be applied in satisfaction of the judgment. The defendant denied having the money in his possession at this time, and did not pay it to the receiver. Application was thereupon made by the receiver for an attachment against the defendant for a contempt in disobeying the order. The judge issued an attachment, commanding the defendant to appear and answer. The defendant appeared, interrogatories were filed, and the defendant answered upon oath, that he paid the money to Woodworth on the 2d of November, before the order to apply it was made.

The county judge thereupon discharged the defendant on the ground that he had purged the contempt. The relator appealed from the order discharging the defendant from the attachment, and the defendant appealed from the order directing the money to be applied upon the judgment, and also from the order ap-

The People, *ex rel.* Pease agt. King.

pointing a receiver. There was no order restraining the defendant from paying the money to Woodworth. The three appeals were heard together.

S. B. JEWETT, *for Relator.*

A. J. WILKIN, *for Defendant.*

By the Court—JOHNSON, Justice. The three appeals, one by the relator, and two by the defendant, may very properly be considered together.

First. The order discharging the defendant from the attachment was properly made. The attachment to appear and answer was not the proper one for the alleged offence. The alleged contempt was the non-payment of a sum of money directed to be paid. In such case the precept issues to commit directly. The process to appear and answer, is for contempts other than those for the non-payment of a sum of money. (2 *R. S.* 585, § 4 and 5; 2 *Barb. Ch. Pr.* 271; 1 *Hoff. Ch. Pr.* 429.) The Code does not prescribe the practice, and the provisions of the Revised Statutes and the former practice are to be followed. But had the attachment been regular, no contempt in not paying was proved aside from the excuse rendered. The order was to pay the money in satisfaction of the judgment, and not to pay it into court, or to the receiver, who is but the agent or officer of the court in which the judgment is docketed.

This was an order to pay to the plaintiff directly in satisfaction of the judgment. No demand by the plaintiff or by any one having authority from him was shown.

It is well settled that a person is not in contempt for not paying money to a person other than the one to whom it is directly payable according to the terms of the order, unless such person is expressly authorized by the person to whom it is payable to receive it. (2 *Barb. Ch. Pr.* 272; 1 *Hoff. Pr.* 430; Wilkins agt. Stevens, 19 *Vesey*, 117.) Paying to the party, and paying into court, or to a receiver, are different things entirely. The proof shows that the money was demanded by the receiver by virtue of the order requiring it to be paid toward the satisfaction of the judgment, and in no other way. That

was the order served when the demand was made, and all the proceedings are based upon it. No contempt was therefore shown.

I think it may well be doubted whether such an order is appealable. The alleged contempt is one of that class denominated extraordinary contempts, in which the dignity of the court is principally concerned, and in which the party has only an indirect interest. The proceeding was never given as a remedy to the party, although he is frequently benefited by it, and is often thus enabled to obtain satisfaction of his demand when all other remedies have failed. It is rather a power conferred upon courts and judicial officers to enable them to protect and preserve their own authority and dignity. I can find no precedent for such a proceeding, where a party has been allowed to appeal from an order of this kind, the only ground of which is, that the court or officers have not manifested by the order a due regard for his or their authority and dignity, by means whereof a party to the action, but not to the proceeding, has possibly sustained an injury. But it is unnecessary to examine this question, as we do not place the decision upon this ground.

Second. The appeal by the defendant from the order directing him to apply this money in his hands toward the satisfaction of the judgment is well taken. The order was wholly unauthorized under the proof before the referee. The evidence clearly shows that this money in the defendant's hands was claimed both by him and Woodworth to be the money of the latter. The county judge, in this proceeding, undertook to try and determine the *bona fides* and validity of Woodworth's purchase at the constable's sale, and the validity of the judgments before the justice upon which the several executions were issued: in short, to determine in this summary manner whether the relator or Woodworth had the superior right to the proceeds of the property purchased by the latter at the constable's sale. This he had no authority to do in this proceeding. Woodworth was in no sense a party. He was called as a witness by the relator, and was not concluded by the order.

The People, *ex rel.* Pease *agt.* King.

Nor would the order, had the defendant complied with it, have afforded him any shield against Woodworth's claim upon him for the money thus in his hands. It was never intended that the judge, under the authority conferred by sections 292 and 297 of the Code, should try and determine questions of this character, as is obvious by reference to § 299.

This case, it is true, is not within the language of that section, as the funds here were in the defendant's hands at the time the order for the examination was made, and the examination had before the referee, but it is clearly within its spirit. (People *agt.* Hulburt, 5 *How. Pr. R.* 446.) This order must therefore be reversed.

Third. The order appointing a receiver was proper. It is just the case where a receiver should be appointed, in a proceeding of this kind, where the funds are in the hands of the defendant. If there is no dispute as to the ownership, and the money in the defendant's hands is clearly his, no receiver is necessary, and none should be appointed, as in that case the proper order is to pay the money, or apply it directly in satisfaction of the judgment. This was the chancery practice before the Code. (*Edwards on Receivers*, 8.) But as the title to the fund in the defendant's hands was disputed, the proper course would have been not to order it to be applied in satisfaction of the judgment, but to make an order restraining the defendant from paying it over to Woodworth or any other person, and to appoint a receiver. The duties of a receiver, in such a case, are prescribed by § 244 of the Code, sub. 5, which are, to apply for an order requiring the defendant to pay the money into court. When the fund is paid into court, all the parties can be heard, and if necessary to a proper disposition of the controversy, the court will order the receiver to bring an action on an issue to be framed to determine the disputed right, in a manner which shall conclude and protect all parties interested, or making claims upon the fund. This view harmonizes the various provisions of the Code, and tends to place the practice upon a footing consistent with the just rights of all parties and adverse claimants. The order discharging the defendant from

the attachment, and that appointing a receiver, are affirmed, and that ordering the money in the defendant's hands to be applied toward satisfying the judgment reversed, with \$10 costs of appeal to the defendant. No costs allowed to the relator.

SUPREME COURT.

MILHAU AND OTHERS agt. SHARP AND OTHERS.

The corporation of the city of New-York, by the Dongan charter, was invested with "full power, license, and authority, to establish, appoint, order, and direct the establishing, making, laying out, ordering, amending, and repairing of all *streets*, lanes, alleys, highways, &c., in and throughout the city, necessary, needful and convenient for the inhabitants of said city, and for all travellers and passengers there." This power has never been withdrawn or essentially changed. The corporation yet has the exclusive right and legislative sovereignty in this respect, to control and regulate the use of the streets in the city. An ordinance *regulating* a street is a *legislative* act, entirely beyond the control of the judicial power of the state.

But the corporation have no power, by resolution of their boards of Aldermen, to grant authority and license to a number of individuals organized as an association for the purpose, the right, upon certain conditions and stipulations, to lay a track for a railway in a street in that city and to run cars and carry passengers for a stipulated fare, for ten years, &c.

Because, it is essentially a *contract*, by which the corporation assume, for what they deem an adequate consideration, to *surrender a portion of their municipal authority*. This can only be done by authority and acts of the *legislature*.

And where no right to rescind the grant is contained in such resolution, the corporation has no power to revoke the license after the grant takes effect, because, valuable rights become *vested* in the associates, or grantees.

It is very questionable whether the corporation has authority to contract beforehand, that for *ten years*, at least, the cars (or carriages) of the associates shall be *licensed*. The license for carriages (by the charter) is to be given by the mayor, *for the time being*.

Although the corporation have power and authority, from time to time, to regulate the *rates of fare* to be charged for the carriage of persons, yet they have no power to contract that any individual or number of individuals, in an associate capacity for ten years, shall have power to demand and receive from every passenger whom they may carry in their cars or carriages, from one point to

Milhan and others agt. Sharp and others.

another, a *fixed sum*. This is invading the *legislative power of their successors*, which the corporation have no right to do. Besides, it would operate as a perpetual *monopoly*.

Where an act of the corporation is clearly illegal, and the necessary effect of such act will be to injure the property of another, the court is warranted in restraining the illegal act by a *perpetual injunction*.

New-York Special Term, Oct. 1853. On the 29th of December, 1852, the Board of Aldermen of the city of New-York adopted a resolution, whereby it was declared that the defendants, and those who might, for the time being, be associated with them, designated as the associates of the Broadway Railway, should, upon certain conditions and stipulations therein specified, have the authority and consent of the Common Council to lay a double track for a railway in Broadway, &c. The resolution was adopted by the Board of Assistant Aldermen on the 30th of December. The associates named in the resolution on the same day filed with the clerk of the Common Council their written acceptance of the resolution, and an agreement on their part to conform to its provisions. The Mayor of the city did not concur in the resolution.

The plaintiffs brought their action against the persons named in the resolution, to restrain them from entering into or upon Broadway for the purpose of laying or establishing a railroad therein, and from digging up, or subverting the soil, or doing any other act in said street tending to encumber the same, or obstruct the free and common use thereof as the same had been enjoyed.

It is stated in the complaint that the plaintiffs are severally owners of certain lots of land and premises upon Broadway; and they severally claim that they are the owners of the land in front of their lots to the centre of the street, subject only to the public easement, or right of way, over the same. It is further stated that the plaintiffs are all residents and corporators of the city, and have been assessed and have paid taxes upon their said property to a large amount. It is further stated that the defendants, under color of the authority contained in the resolution of the 30th of December, 1852, threatened, and gave out, that they would enter into and upon Broadway with their

workmen and servants, and take up the pavements, and dig up and subvert the soil, and would lay down and establish a railroad in said street, and run cars thereon, for their own private interest and emolument, to the great injury and damage of the plaintiffs and other property owners upon that street; that if the defendants should be permitted to take up the pavement in Broadway and establish a railroad there, the property of the plaintiffs would be seriously and irreparably injured and damaged. It is charged that the resolution and the acceptance thereof are of no binding force or effect, and confer no power or authority whatever upon the defendants to take up the pavement, or establish a railroad upon Broadway. The conditions and stipulations annexed to the resolution granting to the defendants authority to construct their railroad, and the other matters stated in the complaint, are sufficiently noticed in the opinion of the court. The action is prosecuted by the plaintiffs on their own behalf, and in behalf of all other tax-payers, citizens, and inhabitants of the city, and owners of property in Broadway. The material allegations in the complaint, except the adoption of the resolution, were controverted by the defendants. The issues were brought to trial at a special term held in the city of New-York, in October, 1853. A great number of witnesses were examined; but as the decision of the court does not involve an examination of the evidence in the case, it is unnecessary to state the testimony.

JOHN VAN BUREN & H. HILTON, *for Plaintiffs.*

D. D. FIELD, *for Defendants.*

HARRIS, Justice. Whether the corporation of New-York has an estate in fee, either absolute or qualified, in the streets of that city, or a mere right of way held for the public use, is quite immaterial for the purposes of this action. In either case it must be conceded the corporation has the right of control over the streets. By the Dongan charter it was invested with "full power, license, and authority, to establish, appoint, order, and direct the establishing, making, laying out, ordering, amending, and repairing of all streets, lanes, alleys, highways,

&c., in and throughout the city, necessary, needful, and convenient for the inhabitants of said city, and for all travellers and passengers there." This power has never been withdrawn, or essentially changed. The corporation yet has the exclusive right to control and regulate the use of the streets in the city. In this respect it is endowed with legislative sovereignty. The exercise of that sovereignty has no limit so long as it is within the objects and trusts for which the power is conferred. An ordinance *regulating* a street is a *legislative act*, entirely beyond the control of the judicial power of the state.

But the resolution in question is not such an act. Though it relates to a street, and very materially affects the mode in which that street is to be used, yet, in its essential features, it is a contract. Privileges exclusive in their nature, and designed to be perpetual in their duration, are conferred. Instead of regulating the use of the street, the use itself, to the extent specified in the resolution, is granted to the associates of the Broadway Railroad. For what has been deemed an adequate consideration the corporation has assumed to surrender a portion of their municipal authority, and have, in legal effect, agreed with the defendants that, so far as they may have occasion to use Broadway for the purpose of constructing and operating their railroad, the right to regulate and control the use of that street shall not be exercised. That the powers of the corporation may be surrendered, I do not deny; but I think it can only be done by authority of the legislature. Thus it was provided by the charter of the Hudson River Railroad Company, that its railroad might be located on certain streets of the city of New-York, "provided the assent of the corporation of the city be first obtained." (*Session Laws*, 1846, p. 274, sec. 4.) Authority to give such assent is implied in the act itself; and the corporation, having, in pursuance of such authority, given its assent to the location of the railroad, and the railroad company having located their road accordingly, the assent became irrevocable. The company acquired a right to the use of the streets for the purposes of its road, and, to a corresponding extent, the corporation was deprived of its power to regulate

and control the use of the streets. So in the case of the Harlem Railroad. (*Sess. Laws*, 1881, p. 827, sec. 11.) That corporation was authorized by the legislature to construct their road across or upon any street in the city of New-York, with the consent and approbation of the mayor, &c., of the city. The same provision is found in the General Railroad Act. (*Session Laws*, 1850, p. 224, sec. 28, sub. 5.) It is thus that the city corporation may, to the extent contemplated by the legislature, restrict its own power to control and regulate streets. (See Drake agt. the Hudson River Railroad Company, 7 *Barb.* 508.) But for the authority derived from the legislature, I am unable to see how a municipal corporation can grant permission to construct a railroad upon one of its streets, which, operating as a contract and vesting rights in the grantee which cannot be recalled, must limit the power of such corporation to manage and control the use of the streets. I think it cannot be done. It cannot be that powers vested in the corporation as an important public trust can thus be frittered away or parcelled out to individuals or joint-stock associations, and secured to them beyond control. It was asserted by the defendants' counsel upon the trial, that the authority to construct a railroad, conferred upon the defendants by this resolution, may at any time be recalled. If this were so, if the resolution could be regarded as a mere revokable license, it would relieve the case from a fatal difficulty; for I am not prepared to say that, in the exercise of the discretionary power with which the corporation is endowed, in the management and regulation of streets, it may not authorize an individual or association to lay down a railroad track even in Broadway. But this resolution goes farther: it authorizes the associates to construct the road, and reserves no right to rescind the grant. It licenses their cars to run upon the road for ten years from the time it shall be opened, at a stipulated fee for each car; and provides that if the parties fail to agree upon the amount to be paid for licenses, at the expiration of that period the railroad, with all the equipments thereto belonging, shall be surrendered to the corporation at a fair and just valuation. Can it be that a contract containing such pro-

visions may be rescinded at the pleasure of the corporation? The very contingency, upon the happening of which alone the parties seem to have contemplated a termination of the contract furnishes the strongest evidence that the grant was intended to be perpetual. I agree with Mr. Justice Bosworth, that "it would be an anomaly if, after the grant had been made and accepted, and the road built in every respect in conformity with the terms of such a grant as is contained in the resolution in question, the common council may rescind the grant and divest the rights acquired under it, precisely as they may order a street to be widened or extended, or repeal any police ordinance or regulation." The same view is expressed by Mr. Justice Strong in the opinion delivered by him upon the motion for an injunction in this cause. After referring to the prominent features of the resolution, that learned judge says: "Surely all these provisions indicate something more than a mere revocable license. They convey a valuable right, which, upon the performance of the primary acts required from the defendants, would vest in them, and of which they could not be deprived by a repeal of the resolution." Mr. Justice Duer, too, in the very able opinion recently delivered by him upon the decision of a kindred action, says: "I am yet to learn that a contract, valid when made, can be rescinded by either of the parties, unless the power of rescinding it is expressly reserved, or was given by some constitutional or statutory provision in force when the contract was made. The license contemplated by the resolution must, therefore, be regarded as perpetual and irrevocable. If it takes effect at all, the right of way now vested in the corporation, so far as it is necessary for the purposes of the defendants, will become vested in them. The exercise of the legislative powers of the corporation, in respect to that street, must be in subordination to the vested rights of the defendants. We have already seen that a corporation cannot, without the consent of the legislature, thus divest itself of its own powers. The resolution itself is, therefore, unauthorized and void."

Again, the corporation has "full power and authority to

make and pass such by-laws and ordinances as it shall from time to time deem necessary and proper to regulate hackney coaches or carriages, and their rates of fare or carriage, requiring the owners of such hackney coaches or carriages to have a license from the mayor of the city for the time being, under the directions of the common council." (2 R. S. 446, sec. 272.) It seems to have been assumed by all parties that the cars which, by the terms of the resolution, the defendants were authorized to run upon the Broadway Railroad, would be "carriages," within the meaning of the term as used in the statute. Accordingly, it is stipulated that "the associates shall pay, for ten years from the date of opening their railroad, the annual license fee for each car now allowed by law, and shall have a *licensé* accordingly." (See opinion of Duer, J., above cited; also, Drake agt. Hudson Railroad Co., 7 Barb. 538.) Assuming that the cars to be employed by the defendants in operating their railroad would be carriages, and as such would require a license from the mayor of the city, it is extremely questionable whether the corporation had the power to contract beforehand, as they have assumed to do, that for ten years at least such carriages or cars should be licensed. The license is to be given by the mayor of the city for the time being. The execution of this provision in the resolution would require the mayor of the city, whoever he might be, and without any reference to his own judgment or discretion in the case, to issue a license for all the defendants' cars. In stipulating for this, I think the corporation has transcended its authority. But, without insisting further upon this point, I think the more fatal objection upon this branch of the case is that the corporation has undertaken to deprive itself of the power conferred upon it by the legislature, in the section of the statute above cited, "to regulate rates of fare or carriage." The associates of the Broadway Railroad are, by a provision in their contract with the corporation, authorized to demand and receive from every passenger whom they may carry from one point to another, *five cents*. Although the legislature has declared that the corporation shall have the power and authority, from time to time, to regulate

the rates of fare to be charged for the carriage of persons, the corporation has said, by this resolution, that in respect to the carriages which may be employed by the defendants in operating their railroad, that power shall never be exercised. This it could not do. The members of the common council by which this resolution was adopted were not authorized thus to invade the legislative power of their successors.

This objection, in a practical view, at least, derives great force from the *exclusiveness*, which is a characteristic feature of the grant. Whether it was intended or not, it is obvious that if the grant takes effect at all, it must operate as a perpetual monopoly. Its privileges are perpetual, or if not, can only be extinguished on the refusal of the grantees to pay such license fee for their cars as the corporation shall exact, and then only upon full indemnity on the part of the corporation. Practically, at least, they are exclusive, too; no one will seriously contend that the corporation would have power to authorize the use of the defendants' track by any person against their will. And although the abstract right to lay another track might exist, yet in fact, the thing would be impracticable; so that the defendants, if they can secure the benefit of their grant, have secured a perpetual monopoly of the privilege of carrying passengers by railroad in Broadway.

What if the corporation, for a consideration deemed adequate—as, for the sake of the comparison, the sweeping and cleansing of the street—had granted to the proprietors of a single omnibus line the privilege of running their carriages forever in Broadway, with the right to charge a specified sum as fare, without reserving the right to regulate such fare—would any one hesitate to say that the corporation had transcended its power in making such a contract? Suppose, further, that the fare which the corporation had thus authorized the omnibus proprietors to exact had been *ten cents* for each passenger, when it was known that the other proprietors were willing to perform the same service for *six cents*, would it not be insisted that, besides going beyond its authority, the corporation had been guilty of a wanton breach of duty? And then, if the

feature of exclusiveness were added to the grant, so that the favored proprietors might enjoy a perpetual monopoly of the carriage of passengers upon Broadway by omnibus, could any tribunal fail to declare the grant illegal and void? The impropriety of such a grant might be more glaring, but, upon principle, I cannot see that it would be more objectionable than that under consideration.

An attempt was made to give perpetuity to the association to be formed under the provisions of the resolution by declaring that, in case any associate should die, or do any act whereby his interest in the association should vest in another, the association should not be deemed to be thereby dissolved, but that the successor in interest should stand in the place of the associate to whose interest he had succeeded. I do not think the object of the parties could be effected in this way. I am not aware of any rule of law which would bind the legal representatives of an associate in case of death, or the assignee in case of insolvency, to become a stockholder, standing in the place of the associate to whose interest he had succeeded. In such a case I suppose he would have the legal right, as in any other unincorporated association, to have the business closed up, and to receive his share of the assets. But, whether this is so or not, I cannot see that this provision can vitiate the grant itself. It is in no respect necessary to support the other provisions in the resolution. Though inoperative, as I think it would be, the other provisions in the resolution might very well stand without it, if otherwise unobjectionable.

Nor do I think the resolution a violation of the provision in the charter which requires that contracts for work to be done, shall be made by the appropriate head of the executive department. This provision, as I understand it, only relates to contracts which would involve a liability to pay for the work to be done. An agreement, as in this case, to sweep and cleanse a street, not for a compensation to be paid, but as the condition upon which the privileges specified in the contract are granted, may, as it seems to me, very well be made by the common

council itself, without the intervention of any of the heads of departments.

Having come to the conclusion that the resolution in question is not within the powers conferred upon the common council, and is, therefore, void, I have not felt myself called upon to examine the questions of fact presented by the pleadings, and to which the evidence presented upon the trial was directed, with the care which their importance would otherwise require. As to the effect of the proposed railway, a great diversity of opinion evidently exists among the citizens of New-York. A large number of witnesses, among whom are gentlemen in whose judgment on such a subject I should have great confidence, are of opinion that it would be a great public benefit, and in no respect injurious; while quite as many more, upon whose opinions I should quite as willingly rely, think the proposed railway would prove a nuisance not to be endured. Under these circumstances, I should not feel myself justified in declaring that the construction of the road would create what, in legal effect, would amount to a public nuisance; yet I may be permitted to add, I am not without strong apprehension that it would prove greatly injurious to the owners of property, especially in the lower portions of the street. I am inclined to think the weight of the evidence tends to this conclusion.

In respect to the circumstances under which the resolution was adopted, I do not think the evidence would warrant the conclusion that the members of the common council who voted for the resolution were governed by corrupt motives or acted in bad faith. And yet the pertinacity with which they persisted in conferring upon these defendants privileges so extraordinary in their character, and which are supposed at least to be of so very great value, is calculated, it must be conceded, to excite a lively suspicion. Other propositions, apparently much more favorable both to the corporation and the public in their terms, were before them. That they should reject these, and adopt the proposition of the defendants, can only be accounted for if the members of the common council who voted for the resolution are to be acquitted of dishonesty upon the theory as-

sumed by the counsel for the defendants upon the argument, that they had no confidence in the good faith of those who made the propositions, inasmuch as they were avowedly opposed to the enterprise.

But, whatever may have been the motives which induced the members of the common council to support the resolution, they transcended their power, and, therefore, even though it may have been unintentional, were guilty of a breach of duty. They had no right to make the grant contemplated by the resolution, and having attempted it, they were chargeable with a violation of official trust.

The only other question which I deem it useful to notice is, whether the plaintiffs are entitled to the remedy for which they ask? The corporation had assumed authority to grant permission to the defendants to lay in Broadway a railroad track. By virtue of such permission, and yet without legal authority, the defendants were about to proceed to the execution of their purpose. The illegal act thus about to be committed would, if consummated, result in special, and perhaps irreparable injury to the plaintiffs, and others, who, like them, are owners of real estate situated upon Broadway. Besides their interest in common with other corporators and tax payers, they had this other special and more important interest to be affected by what might be done by the defendants under their pretended license from the corporation. Upon this state of facts I cannot doubt that the plaintiffs are entitled to an injunction. The act about to be committed by the defendants was unlawful, but whether it would amount to a public nuisance may, as the evidence in the case stands, be questionable. But whether a public nuisance or not, it would, I have no doubt, prove injurious to the property of the plaintiffs. If so, whatever the public rights may be, they are entitled to have such unlawful act restrained. A nuisance may be both public and private. To the individual who has sustained actual damage as the result of the wrongful act it may be regarded as a private nuisance, even where the party chargeable with such wrongful act might also be convicted of a public nuisance.

Hulce agt. Thompson.

(See *First Baptist Church, &c. agt. Schenectady and Troy Railroad Company*, 5 *Barb.* 79, and cases there cited. See also *Code* § 219; *Christopher agt. The Mayor of New-York*, 18 *Barb.* 567.) In the latter case it was held that where an act is clearly illegal, and the necessary effect of such act will be to injure the property of another, the court is warranted in restraining the illegal act by injunction. The plaintiffs present such a case. The act sought to be restrained, as we have already seen, is wholly unauthorized and clearly illegal. The effect of the act, if committed, would be injurious to the property of the plaintiffs. I am, therefore, of opinion that the injunction should be made perpetual.

SUPREME COURT.

HULCE agt. THOMPSON.

Where, upon the proper allegations of fact contained in the complaint, the plaintiff claimed judgment, "that the defendant be ejected from the house and door yard, and that the possession thereof be restored to the plaintiff; also, that the plaintiff recover a judgment of \$500 damages for the trespasses committed on the other portions of said farm by the defendant; and also, that defendant be restrained by injunction from committing further trespasses and waste on said farm."

Held, that two causes of action were improperly united. Why? Because, the different claims set up in the complaint—ejectment for the possession of the house and door yard—and trespass for cutting grass and destroying fences, &c., on the farm—are not "connected with the same subject of action." (*Code*, § 167.)

Delaware Special Term, Feb. 1854. Demurrer to complaint for a misjoinder of actions.

HOTCHKISS, SEYMOUR, & BALCOM, for Plaintiff.

WHEELER & MORE, for Defendant.

CRIPPEN, Justice. The complaint sets forth that the plaintiff is the owner of a certain farm, describing it situated in the

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town of Tompkins, Delaware county, containing one hundred and twenty acres; that the defendant by the permission of the plaintiff occupied the dwelling house and door yard on said farm up to the first day of May, 1853; that the defendant held over without permission, and on the 24th day of May the plaintiff caused a written notice to be served on the defendant, requiring him to quit possession of said house and door yard within the period of one month thereafter; that the defendant disregarded said notice, and continued to hold possession. The complaint also alleges that the defendant committed divers trespasses on other portions of said farm in the plaintiff's possession, by cutting the grass, burning up and destroying fences, &c.

The complaint concludes with a claim of judgment, that the defendant be ejected from the house and door yard, and that the possession thereof be restored to the plaintiff; also that the plaintiff recover a judgment of \$500 damages for the trespasses committed on the other portions of said farm by the defendant; and also, that defendant be restrained, by injunction, from committing further trespasses and waste on said farm.

The defendant demurred to said complaint, on the ground that two causes of action are improperly united therein, to wit: a claim for the recovery of real property, that is to say, the house and door yard described in the complaint; and also a claim to recover damages for injuries and trespasses committed upon the farm described in said complaint, other than the house and door yard.

The question presented by the demurrer arises from the obscurity and uncertainty of § 167 of the Code. That section allows the plaintiff to unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: 1st. The same transaction or transactions, connected with the same subject of action. 2d. Contracts, express or implied; or 3d. Injuries with or without force to person or property, or either; or 4th. Injuries to character; or 5th. Claims

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to recover real property, with or without damages, for withholding thereof, and the rents and profits of the same. The causes of action that may be united in the same action must all belong to one of the classes contained in the above quoted section of the Code. Each subdivision it is fair to presume was intended to provide for a class of cases not included in either of the other subdivisions. The plaintiff in one *count* (if we are at liberty to use the word) seeks to recover the house and door yard which he alleges to be in the possession of the defendant, and by him wrongfully withheld. This was formerly called an action of ejectment. Under the 5th subdivision of § 167, the plaintiff may recover the real property and also damages for withholding the same, together with the rents and profits of the same. This subdivision is undoubtedly applicable to the action of ejectment for the recovery of real property, and makes ample provision for the recovery in the same action of any damages to which the plaintiff may be entitled for an injury done to the property, and also the rents and profits. These several claims may be united in the same action.

The 3d subdivision of said section makes it lawful for the plaintiff to unite all injuries committed with or without force, to person or property, or either. It is difficult to discover in what way the plaintiff's claim for the house and door yard can fall within the scope and meaning of this subdivision. The plaintiff does not seek to recover for any injury done thereto, but to recover the thing itself; and not only so, but subdivision 5 makes ample provision in all cases for the recovery of damages to real property, where a recovery of the property itself is claimed in the same action. The plaintiff's counsel do not rely on the 3d subdivision of the section to uphold the complaint; they insisted on the argument that the first subdivision authorizes the form of complaint adopted by the plaintiff in this action, or the union of the actions as therein set forth. The argument is based upon the ground, that both causes of action, or the distinct and separate claims made in the complaint arise out of the same *transactions, and are connected with the same*

subject of action. If this were so in fact, then the complaint should be upheld. Let us examine and see how the matter stands. The allegations in the complaint make the house and door yard one subject of action. The plaintiff seeks to recover the possession of this portion of the property involved in the action; it is a distinct claim or cause of action; it has no connection with the claim of damages for the trespasses alleged to have been committed by the defendant on other portions of the farm. It is true that both claims or causes of action set up in the complaint arise from the wrongful acts of the defendant; he unlawfully withholds the possession of the house and door yard; he also unlawfully cut the grass and destroyed the fences, and committed other acts of trespass on the plaintiff's farm irrespective of the house and yard in question. Yet the difficulty remains, that withholding the possession of the house and yard, and the committing of the trespasses, do not proceed from the same transactions; neither are they connected with the same subject of action within the meaning of subdivision 1 of § 167 of the Code. It is entirely clear from the case as set forth in the complaint, that the claim in ejectment arises from the defendant's refusing to surrender to the plaintiff the possession of the house and door yard. This then, as a transaction, has no connection whatever with the trespasses of the defendant in cutting the plaintiff's grass, destroying his fences, &c.; they are entirely distinct and unconnected transactions, having no affinity or relation to each other. Neither am I able to discover by any fair course of reasoning in what way the different claims set up in the complaint are *connected with the same subject of action.* It is manifest that one subject of the action is the house and door yard; the other is the trespasses committed by the defendant on the plaintiff's farm, in cutting the grass, burning fences, &c. It is true that the house and yard are situated on the same farm whereon the grass was cut by defendant, and other trespasses committed by him; yet the farm is not made the subject of action by the complaint within the spirit and meaning of subdivision 1 of § 167.

In any view of the questions raised upon the demurrer, I

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have not been able to bring my mind to the conclusion, that the causes of action set up in the complaint can be united in one action; on the contrary, I am satisfied they cannot be.

Judgment, therefore, must be rendered for the defendant on the demurrer with costs, with leave to the plaintiff to amend the complaint in twenty days after notice of this decision, on payment of the costs of the demurrer.

OSWEGO COUNTY COURT.

BURDICK, Respondent agt. McAMBLY, Appellant.

The Code does not authorize the joinder of actions in the same complaint of *contract* and *tort*, in a *justice's court*, any more than in a complaint in a court of record.

But where such joinder is made in a justice's court, the only remedy is, to require the plaintiff upon joining issue, or before proceeding to trial, to *elect* to which class of actions he will be confined.

January Term, 1864. Appeal from a justice's court. Burdick sued McAmbly and complained for a fraud in the sale of a horse, and also for a breach of the contract of purchase. McAmbly for answer denied the several allegations of the complaint. Before proceeding to trial, the defendant called upon the justice to require the plaintiff to elect upon which count in his complaint he sought to recover. The justice refused the defendant's request. Judgment was rendered in favor of the plaintiff for one hundred dollars, besides costs, and the defendant appealed.

D. H. MARSH, *for Respondent.*

O. & W. G. ROBINSON, *for Appellant.*

TYLER, County Judge. I am of the opinion that it is irregular, as well in a justice's court as in a court of record; for the plaintiff to join in the same complaint actions on contract and in tort. It is contended by the counsel for the respondent, that

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inasmuch as no provision is made in the rules prescribed in section 64 of the Code for objecting to the joinder of different causes of action, therefore there is nothing to prevent the litigating in one suit in a justice's court all of the various causes of action of which the justice has jurisdiction. To this doctrine I cannot for a moment assent. I cannot believe that the law-makers ever contemplated a thing so utterly absurd. Indeed, if we look only to the title of the Code relating to justices' courts, we find no authority for the joinder of different causes of action in one complaint in any case. The only provision upon the subject is that contained in rule 8 of section 64, which is as follows: "The complaint shall state in a plain and direct manner the facts constituting the *cause* of action." It will be perceived that this language comprehends only a single cause of action. The provision with respect to the complaint in a court of record is substantially the same, but in addition, it is enacted in section 167 that "the plaintiff may unite in the same complaint several causes of action," when they "belong to the same class." It is unnecessary to state the absurdity of uniting in one complaint an action upon a promissory note, another for the conversion of personal property, another for seduction, and another for fraud in the sale of personal chattels. The objection is obvious to every member of the legal profession. I have no doubt, however, that the plaintiff in a justice's court may unite in one complaint as many causes of action on contract, express or implied, as may be within the jurisdiction of the justice. He may also in like manner join in one complaint all actions for torts properly cognizable before a justice of the peace; but that the causes of action so united, must all belong to one only of the classes specified in § 167 of the Code.

But suppose the plaintiff *does* unite in one complaint actions *ex contractu*, and actions *ex delicto*, in what way is the defendant to avail himself of the objection? He cannot do so by *demurrer*, because that is not cause of demurrer according to rule 6 of section 64 of the Code. Benedict, in the last edition of his treatise, at page 102, lays down the rule, that actions on

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contract, and in tort, cannot be united in one complaint; but he fails to give the remedy in case such improper joinder is made. In a work entitled the "New-York Civil and Criminal Justice," I find it is stated that in such case the objection must be taken in the answer. This position can hardly be correct, for the answer must contain matters only of *defence*. This objection does not constitute a defence to the action, and hence can be considered no answer. On the whole, I can see no way to make the objection available, but by compelling the plaintiff, at the time of joining issue, or upon the trial, to elect to which class of actions he will be confined. The more convenient and appropriate time, undoubtedly, would be to make the election at the joining of issue, and yet when it is not made at that time I think the plaintiff may be required to do so before proceeding to trial. It follows, therefore, that the justice erred in this case, in refusing to compel the plaintiff to elect upon which of his counts he would proceed. Judgment reversed.

SUPREME COURT.

RANSOM AND OTHERS agt. HALCOTT, Sheriff of Greene Co.

Where a sheriff, to whom an attachment was issued under § 231 of the Code, neglected to levy on sufficient property to satisfy the debt, he was held liable in an action against him for the deficiency, it appearing that the defendant in the attachment had sufficient property to satisfy the demand, and that the sheriff knew it at the time of making the levy.

Third District General Term, Dec. 1858. Present, Justices PARKER, WRIGHT, & HARRIS.

This was an action brought to recover damages against the defendant, as sheriff of Greene county, for neglecting to attach sufficient property to satisfy the plaintiffs' demand against one Peter Vandenburg. On the 5th of April, 1852, an attachment against Vandenburg in favor of Hoy & Wilson was issued and put in the defendant's hands, on which the

plaintiffs therein claimed, including costs and expenses, \$258,29. By virtue of that attachment, the defendant immediately attached all the personal property of Vandenburg, which was duly inventoried and appraised by sworn appraisers at \$2,330,72. On the 10th of April, 1852, another attachment against Vandenburg, in favor of Starbuck, was issued to the defendant, on which the plaintiff therein claimed \$365,97, under which the defendant levied on the same personal property, which was also inventoried and appraised as under the first attachment. At a later hour of the day on the said 10th day of April, 1852, another attachment against Vandenburg in favor of Learned & Thatcher was issued to the defendant, on which the plaintiffs claimed \$323,85, and under that attachment also, the defendant levied on the same personal property, which was also inventoried and appraised as under the first attachment.

At a still later hour, on the said 10th day of April, 1852, another attachment in favor of these plaintiffs against Vandenburg was issued to the defendant, in which the plaintiffs claimed \$265,17, and under that attachment the defendant levied on the same personal property, which was also inventoried and appraised as aforesaid.

At the time these several attachments were issued, Vandenburg had real, as well as personal property, and the defendant knew, at the time he made the several levies on the personal property, that Vandenburg was the owner of such real property.

On the 17th day of April, 1852, a fifth attachment was issued to the defendant against said Vandenburg in favor of Mallory & Ingalls, on which the plaintiffs therein claimed \$768,49, under which the defendant immediately levied on all the real as well as the personal property of Vandenburg.

Judgments were recovered in the actions in which the first four attachments were issued, and executions were issued under which the defendant sold the personal property so levied on, and applied the proceeds in the order of the several levies; but the avails proved insufficient to satisfy the execution

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in the third case, and there was nothing to apply on the plaintiff's execution.

A judgment was also recovered in the action in which the fifth attachment was issued, another execution was issued under which the real estate levied on was sold for \$878, and the avails applied under the direction of the court to satisfy the demand of said Mallory & Ingalls.

Before the plaintiffs obtained judgment in their action, other judgments had been recovered and duly docketed by other creditors of Vandenburg, to an amount much larger than the value of his real property.

Under these circumstances, the plaintiffs claimed to recover from the defendant the damages they had sustained by the neglect of the sheriff to levy on the real property of Vandenburg under the plaintiffs' attachment. Issue having been joined, the action was tried at the Greene Circuit before Mr. Justice HARRIS, in November, 1853, when a verdict was taken for the plaintiffs for \$290,28, subject to the opinion of this court in general term.

LEARNED & WILSON, *for Plaintiffs.*

ADAMS & KING, *for Defendant.*

By the Court—PARKER, P. J. Before the defendant, as sheriff, received the attachment of the plaintiffs, he had received three attachments in favor of other creditors, under which he had levied on all the personal property of Vandenburg. Though he knew that Vandenburg had also real property, he did not levy upon it, but levied plaintiffs' attachment only on the same personal property previously levied on. When the fifth attachment reached him, he levied for the first time on the real property, and the avails of his real property were accordingly applied on that demand. A subsequent creditor was thus, by the act of the defendant, preferred to the plaintiffs, who lose their demand in consequence of the neglect of the defendant.

The question presented on these facts is, whether the defendant is responsible for not having levied on enough property

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to satisfy the plaintiffs' demand, when the debtor had sufficient property and the defendant knew it.

By the Revised Statutes, the warrant of attachment, in terms, commanded the sheriff to attach all the property, real and personal, of the debtor in his county. (2 R. S. 4, § 6, *id.* 459, § 16.) But these proceedings were instituted under the Code, (§ 281,) which requires the sheriff to attach and safely keep all the property of the defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiffs' demand, together with costs and expenses.

Under this attachment the sheriff had a right to levy on all the property of the debtor, and he was bound, I think, at his peril, if he did not levy on all, to levy on enough to satisfy the demand. The form of the attachment is substantially like that of an execution against property, and, I think, it is to be governed by the same rule as to the extent of property levied on. There is the same reason for the rule in both cases. Under an execution, it would not be contended that a sheriff will be excused if he fails to levy on sufficient property to satisfy it. (*Allen on Sheriffs*, 142; 18 *Serg. C. R.* 450.) The adequacy of the extent of the levy is to be ascertained by the result of the sale. (1 *Swift's Digest*, 797; 8 *Alabama R. N. S.* 625; 9 *Alabama N. S.* 88; 5 *Pike* 680; 1 *Day R.* 128.) In Connecticut, where *mesne* process of attachment has long been in use, it is well settled that if the property taken be insufficient, and the defendant had enough property to pay the debt, the officer will be held personally liable for the deficiency. (1 *Swift's Digest*, 590.)

It can be no excuse to the sheriff that the property was appraised at a sum sufficient to pay all the attachments. The appraisal is not made to enable the sheriff to know on how much to levy, but it is made after the levy, with a view to the sheriff's accountability for the property, and for the protection of an absent defendant. An appraisal was required under the Revised Statutes, where all the property was levied on. The appraisal under the Code is a continuation of the same practice. It is not for the benefit of the plaintiff that an appraisal is

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made, and it is no security to him. It is *ex parte* the act of those selected by the sheriff, over whom the plaintiff has no influence. Lawson agt. the State, (5 *English (Ala.) Rep.* 28.)

It is the right of the creditors to have the respective attachments take priority according to the date of their delivery to the sheriff. But by the act of the defendant, the attachment of the plaintiffs was postponed to that of Mallory & Ingalls, which was subsequently issued. When the defendant attached the land under the attachment of Mallory and Ingalls, it seems to me it was clearly his duty to attach it also on all the prior attachments, so as to secure their rightful priority, if the personal estate should prove to be insufficient to satisfy them. Arhems agt. Noland, (2 *J. J. Marsh*, 421.)

Whether the act was intentional or the result of negligence, I think the defendant is bound to compensate the plaintiffs for the injury they have sustained, and that the plaintiffs are entitled to judgment.

SUPREME COURT.

GOODING agt. M'ALISTER.

Under the Code, a *demurrer* will in no case lie for *duplicity*; and the only mode for a party to avail himself of such objection is by motion to *strike out* or compel the party to *elect*.

That is, several causes of action, which by § 167 may be united in the same complaint, although contained in one count or statement—not *separately stated*, cannot be *demurred* to. (*This is adverse to the case of Durkey agt. The Saratoga and Washington R. R. Co.*, 4 *How. Pr. R.* 226.)

Where the plaintiff in the first count or statement in the complaint claimed to have a written contract reformed, on the ground that a material part of the agreement had been by mistake omitted; and that when so reformed and made to express the agreement intended by the parties to it, to have it enforced against the defendant, and that the plaintiff recover a certain sum so due him upon said contract, with interest, *held*, on demurrer, that it presented a case of equity jurisdiction exclusively, and did in fact contain but *one cause of action*.

Gooding agt. M'Alister.

Ontario Special Term, May, 1853. Demurrer to first count or statement of cause of action of complaint.

The complaint states, that on or about the 19th day of October, 1850, the plaintiff and defendant made an agreement or memorandum in writing in the following words:—

“In consideration of the agreement herein contained on the part of John M'Alister of Waterloo, I do hereby agree to deliver to said M'Alister, at the freight depot of the Rochester and Syracuse Railroad, in the village of Canandaigua, all the sheep pelts that shall be taken off at any slaughtering establishment in Bristol, Ontario county, from my own sheep, in the months of November, and December, and January next, and the last four days of October instant, in good merchantable order, said pelts to be taken from good slaughtering sheep, ewes and wethers, not to exceed ten lambs in each hundred—said M'Alister agrees to take and receive one thousand of said pelts per week, green.

“Said M'Alister agrees to pay to said Asahel Gooding for each and every of said pelts so delivered, the sum of eighty-three cents on delivery, except the lambs' pelts, for which said M'Alister agrees to pay seventy-one and a half cents each, on delivery.

“It is mutually understood that the whole number of pelts to be delivered under this contract shall be from fifteen to twenty thousand, and that not over two thousand pelts per week shall be taken off, unless the weather is such as to render it proper to slaughter them sooner and faster than at that rate.

“Witness our hands, the 19th day of October, 1850.

(Signed,)

“ASAHEL GOODING,

“JOHN M'ALISTER, by

.. “JOHN STOUT, Agent.”

The complaint further states, that at the time of making said agreement or memorandum, and before reducing the same to writing, it was expressly agreed and understood between the parties, that the plaintiff reserved, and should have the right to

retain for his own use the pelts of a certain lot of about one thousand sheep, known and distinguished as the Sisson sheep, and that the plaintiff was under no circumstances liable to deliver the pelts of said lot of sheep, or any portion of the same, upon said contract; and the parties have both acted upon the faith of that agreement, except as hereinafter stated.

The complaint further states, that a portion of said agreement in writing was drawn by the defendant at Waterloo, in the county of Seneca, and a portion at Canandaigua, in Ontario county, and the same was executed at the latter place; that the agreement was made in behalf of the defendant by one James R. Webster, as his agent, and the said John Stout was authorized by the defendant to fill up and execute the same on his part, and at the time of the execution of said memorandum, both said Webster and said Stout were present acting in behalf of the defendant. That said memorandum, as the plaintiff supposed and believed, at the time he executed the same, contained the reservation and exception of the pelts from said lot of sheep aforesaid, and plaintiff never learned the contrary thereof to be true until after the time of the completion of said agreement had expired. That in pursuance of said agreement, supposing and believing it contained the said exception, the plaintiff went on, from time to time, delivering pelts as therein provided, and in all delivered fifteen thousand one hundred and eight sheep pelts, and seven hundred and forty-seven lambs' pelts, amounting at the prices fixed by said contract to the sum of \$18,078,54, that the same were delivered in pursuance of and according to the requirements of said contract. That the parties both acted upon the belief that said reservation was inserted in said agreement, and frequently during the period of said delivery conversed about said reservation as being part of said contract and contained therein, and the plaintiff has in all respects complied therewith on his part. That the said memorandum was completed in haste, late in the evening of the day it bears date, and that the omission to insert said exception and reservation was purely inadvertent and by mistake on the part of the plaintiff and defendant's agents, and the person who completed the draft

of the memorandum. That the defendant, though he has received the pelts so delivered upon said contract as aforesaid, and has converted the same to his own use, has neglected and refused to pay the plaintiff therefor, &c., and that there is due the plaintiff over and above all payments, &c., the sum of \$1,573,54, with interest, &c. That the defendant, contrary to the express understanding and agreement aforesaid, and taking advantage of the omission, &c., withholds the sum justly due the plaintiff as aforesaid, upon the unjust and unfounded pretence that the plaintiff has violated his agreement by not delivering the pelts from said one thousand sheep, reserved and excepted as aforesaid, and is seeking to take advantage of the omission to insert said reservation or exception in said agreement, and thereby to deprive the plaintiff of the sum justly due him as aforesaid, and has refused, though called upon by the plaintiff so to do, to reform the said agreement in writing by inserting said reservation therein, and conforming the same to the agreement actually made between the parties, &c.

The complaint then, as a further cause of action, states the sale and delivery by the plaintiff to the defendant, on the 13th October, 1850, and on divers days between that day and the 6th January, 1851, of divers quantities of sheep pelts, amounting in all to the number of fifteen thousand eight hundred and fifty-five, of the value of \$13,073,54, and that defendant is still indebted therefor in the sum of \$1,573,54, and interest, &c., which the defendant, though requested, refuses to pay, &c.

The complaint then concludes as follows: "The plaintiff therefore demands the relief appropriate to the case, and asks a decree or judgment for a reformation and change of the said memorandum of the agreement made between the parties, by inserting therein the reservation and exception omitted as aforesaid, and by correcting the said mistake therein, and also that the plaintiff recover the sum so due him upon the said contract, and for pelts so sold and delivered as aforesaid, with interest as aforesaid, and for such further and other judgment and relief as shall be deemed appropriate, &c."

The defendant demurred to the first count or statement of cause of action, assigning special causes of demurrer.

A. T. KNOX, *for Defendant.*

E. G. LAPHAM, *for Plaintiff.*

WELLES, Justice. The complaint contains two counts or statements of causes of action, and the demurrer is to the one first stated and set forth. The demurrer must, therefore, be examined and decided the same as if there was no other count than that to which it refers. The objection alleged to this count is that it contains two distinct causes of action, the one equitable and the other legal. If this were so, I do not think a demurrer will reach the objection. If a plaintiff in an attempt to present a single and entire cause of action in one count or statement, misjudges, and in fact spreads out two or more good causes of action, when he supposed he had, and only claimed one, in my opinion the most simple and appropriate way for the defendant to take advantage of it is, to move to have all but one struck out of the complaint as redundant. On such motion, the court would not grant the motion to strike out unless it appeared entirely clear that the count did in fact contain more than one good and complete cause of action, and would probably in that case, upon such terms as should be just, allow the plaintiff to amend by severing the statements so as to appear in form, to contain the different causes of action in conformity with the principles stated in the opinion of Justice SELDEN, in *Benedict agt. Seymour*, (6 *How. Pr. R.* 298,) to which I fully subscribe.

The defendant's counsel insists that the Code (§ 144, *sub.* 5) allows a demurrer for such cause. That section enumerates six causes for which a defendant may demur to the complaint, and the 5th is, "That several causes of action have been improperly united." Section 167 shows what causes of action may be united in the same complaint, and those that may be so united are required to be separately stated. Suppose, in a case where several causes of action are united in one complaint, and they are such as the section last referred to allows to be

united in the same complaint, but they are not separately stated ; would such omission subject the complaint to a demurrer? The causes of action thus stated are properly united in the complaint, and the only difficulty is, they are not separately stated. The objection which subdivision 5 of § 144 allows to be taken by demurrer, it seems to me, must be something which amounts to a violation of § 167, providing what causes of action may be united *in the same complaint*. Subdivision 5 of § 144 allows a demurrer, where several causes of action are improperly united. That several such causes which may be so united, are not separately stated, is not among the objections for which, by the last-mentioned section, the defendant may demur.

In *Durkey and others agt. The Saratoga and Washington R. R. Co.* (4 *How. Pr. R.* 226,) Mr. Justice WILLARD adopted a different construction of § 144, holding that the language of subdivision 5 of that section referred to causes of action improperly united in the same count or statement. He rests the argument principally upon the concluding words of § 167, "*and must be separately stated.*" He seems to me to have lost sight of the language in the former part of the section, which allows the plaintiff to unite *in the same complaint* several causes of action. Several causes of action may be united in one complaint, and although not separately stated, still, they are properly united *in the complaint*. That is to say, it is no objection, that they are united in the same complaint, but the objection is that they are not separately stated. They may be properly united, but improperly stated. I shall of course be understood to refer to causes of action which by § 167 may be united in the same complaint.

It was a misjoinder of causes of action, which was intended by subdivision 5 of § 144 to be a ground of demurrer to the complaint. What I mean by a misjoinder is, the union in one complaint of causes of action not allowed by § 167, as for example, a cause of action upon a contract with one for an injury to the person.

I am constrained, therefore, for the reasons stated, to differ

from the learned justice and able jurist to whose opinion I have last referred, and to hold that under the Code a demurrer will in no case lie for duplicity, and that the only mode for a party to avail himself of such objection is by motion to strike out or to compel the party to elect.

The foregoing views, it will be perceived, are only applicable to the present case, upon the assumption that the count demurred to, does, in fact, contain more than one cause of action. I am, nevertheless, entirely satisfied upon a deliberate examination of the count in question, and upon consideration of the authorities upon the subject, that it contains but one cause of action. The case made by it is purely of equitable cognizance. The object is to have a written contract reformed on the ground that, as alleged, a material part of the agreement was by mistake omitted, and when so reformed and made to express the agreement intended by the parties to it, to have it enforced against the defendant, as it shall stand reformed.

That such a case, when properly established by evidence, is a proper subject of equitable jurisdiction, is now well settled. (*Story's Eq. Jur.* § 157 to 161 inclusive;) Gillespie agt. Moon, (2 *Johns. Ch. R.* 585;) Keisselbrack agt. Livingston, (4 *Johns. Ch. R.* 144.) It was proper for the plaintiff to invoke the equitable power of the court to correct the mistake in the written contract, and in the same count or statement to allege the violation by the defendant of the actual agreement, and then demand judgment for such relief as his case, when proved, would entitle him. On the hypothesis of such mistake, it was the only way he could frame his case so as to entitle himself to full relief. It is true the ultimate relief he needs, upon his own showing, is payment for the pelts delivered at the price agreed upon. But this he may not be, and probably is not entitled to, by virtue of the agreement as reduced to writing, which at law would be conclusive upon the parties, whatever the previous agreement was between them, and which they intended to have embodied in the writing, until it is reformed, so as to express the true agreement of the parties. Admitting that the plaintiff could recover, aside from the contract, for the pelts actually

delivered by the plaintiff, and received by the defendant, still he could not demand the contract price, although it might be his interest to do so, without showing performance on his part, which he could not do, as the contract now stands written, provided he has availed himself of the reservation or exception, which he alleges was a part of the agreement as made, and which was omitted by mistake to be inserted in the agreement, as reduced to writing.

Having presented a case of equity jurisdiction exclusively with a view to the reformation of the written agreement, it is no objection to the practical relief which he seeks, that it could be given in a court of law or according to the principles of the common law, upon the contract after it shall be reformed. It would be a reproach to the administration of justice to turn the party over to another tribunal, or to another form of action in the same tribunal, to obtain the relief, which he was obliged to appeal to its equitable jurisdiction in order to be put in a condition to ask for. The rule, with respect to a court of equity is, that the jurisdiction, having once attached, it shall be made effectual for the purposes of complete relief. (*Story Eq. Jur.* § 64, *k.* and 65.)

I am accordingly of the opinion that the plaintiff should have judgment on the demurrer, unless the defendant pays costs and answers the count demurred to in twenty days.

SUPREME COURT.

EMERY agt. EMERY AND REDFIELD.

Where the action is upon contract against *joint debtors*—copartners in business—the plaintiff may serve process upon one only, and proceed and take judgment against the defendant served, unless the court interpose; and may also enter judgment against all the defendants thus jointly indebted, so far only as that it may be enforced against the *joint property* of all, and the separate property of the defendant served. (*Code*, § 136, *sub.* 1.)

The *offer* to take judgment, authorized by the 385th section of the Code, is in sub-

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stance and effect a *cognovit*, as formerly allowed under the Revised Statutes, and should be governed by the same rules.

Consequently, one defendant, a joint debtor, served with process, may, by an offer under § 385, bind his codefendant not served, as to joint property.

Such a judgment may be "*enforced* against the joint property of all, and the separate property of the defendant served." (§ 136, *sub.* 1.) The term "*enforced*" is undoubtedly used to embrace all the legal means of collecting a judgment, including "*proceedings supplementary to execution*," which are as much a mode of *enforcing* a judgment as the execution itself.

It seems that there is no case where an execution has been regularly issued and returned unsatisfied, in which the creditor may not proceed under the 292d section of the Code to obtain satisfaction of his judgment.

It is not necessary to make a joint judgment debtor, who has not been served with process, a *party* to supplementary proceedings, because the equities between the debtors themselves are not to be regarded; there can be no decree for contribution, as was formerly the case under a creditor's bill.

Albany Special Term, January, 1854. Motion to set aside judgment, &c. The defendants, prior to December 10, 1853, had been copartners in business, under the firm of *Emery & Co.* On the day last mentioned the copartnership was dissolved, and it was agreed between the parties that the business should be settled by Henry D. Emery, one of the defendants, and Stephen Van Rensselaer, to whom, at the same time, the defendant Redfield assigned his interest in the property of the firm.

On the 30th day of December, 1853, this action was commenced by the service of a summons and complaint upon the defendant, Henry D. Emery. The action was brought upon partnership liabilities. On the same day Henry D. Emery served upon the plaintiff's attorney an offer in writing consenting that the plaintiff might take judgment for \$3,696,64, which offer was accepted by the plaintiff's attorney, and on the same day judgment was perfected for the amount specified in the offer, together with \$8,57 costs. The offer was signed by Emery in the name of *Emery & Co.* No papers were served on the defendant, Redfield, nor did he appear in the action. The offer made by Emery was unauthorized by him. The judgment is in form against both defendants; but it appears from the judgment roll that the summons and complaint had been served on Emery only.

On the same day on which judgment was perfected an execution was issued to the sheriff of Albany, in the usual form, with directions not to levy on the separate property of Redfield. The execution was returned wholly unsatisfied on the 31st of December, and, on the same day, the plaintiff's attorney procured from one of the justices of this court an order requiring the defendants to appear before him to answer concerning their property. The order was served on Henry D. Emery, who appeared in obedience thereto, and having been examined, an order was made on the same day appointing Austin S. Kibbe receiver of the property of the defendants, and thereupon an assignment to the receiver was executed by Henry D. Emery. These proceedings were had without notice to the defendant, Redfield, although he was in the city of Albany during the time, and this fact was known to the plaintiff or his attorney.

Upon affidavit, stating these facts, a motion was made on behalf of the defendant, Redfield, to set aside, as against him, and so far as they might affect him in any way, the offer signed by the defendant, Henry D. Emery, the judgment perfected thereon, and all subsequent proceedings.

H. HARRIS, *for Plaintiff.*

P. F. COOPER, *for Defendant, Redfield.*

HARRIS, Justice. The action in this case was upon contract, and the defendants were jointly indebted. In such a case, the plaintiff may, if he choose, serve his process upon one defendant, and omit to serve it on another. He may do this for the very purpose of avoiding the delay to which he might be subjected by a hostile defendant. (See Olwell agt. M'Laughlin, 10 *Leg. Obs.* 316.) Having done this, he may proceed to judgment against the defendant served, unless the court interpose, "and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served." (*Code*, § 136, *sub.* 1.) The provisions of the Revised Statutes on the subject are to the same effect, (2 *R. S.* 377; *Sess. Laws*, 1833, p. 395, § 3.)

Under the former practice, the joint debtor who had been served with process might appear and sign a *cognovit* for the plaintiff's demand, upon which judgment might be entered against all the defendants, which judgment became a lien upon their joint property as well as the separate property of the party served. (See Pardee agt. Haynes, 10 *Wend.* 680.) The offer authorized by the 385th section of the Code is, in substance and effect, a *cognovit*. It should be governed by the same rules. Accordingly, it was held in *Sterne agt. Bentley*, 3 *How.* 381, that the offer, like a *cognovit*, might be signed by an attorney—and where an attorney, being employed by one defendant, had signed an offer to allow judgment to be taken for another who had not been served with process, the judgment was allowed to stand. In *La Forge agt. Chilson*, 3 *Sand.* 752, the court said, “The rule we mean to declare is, that when an offer is made by one or more defendants, under the 385th section of the Code, and the suit is so situated that the plaintiff, upon accepting it, may enter judgment to the effect offered, against all the parties jointly liable with those making the offer, the plaintiff must accept the offer or proceed at his peril as to the future costs in the cause. The defendant served with process, in this case, having offered to allow judgment to be entered for the amount claimed, the plaintiff had no alternative but to enter judgment, unless he was obliged to bring in the other defendant. This it cannot be pretended he was bound to do. The judgment was therefore regular. It had the effect declared by the first subdivision of the 136th section of the Code.

I think, too, the proceedings supplementary to execution were regular. It is declared that such a judgment may be enforced “against the joint property of all, and the separate property of the defendant served.” I understand the term “enforced,” as here used, to embrace all the legal means of collecting a judgment. The proceedings supplementary to execution are but a kind of execution against property which cannot be reached through the intervention of the sheriff. They are as much a mode of *enforcing* a judgment as the execution

itself. Accordingly, it is provided, that when an execution, properly issued, has been returned unsatisfied, the judgment creditor is entitled to an order for the examination of the judgment debtor concerning his property. I know of no case where an execution has been regularly issued and returned unsatisfied, in which the creditor may not proceed, under the 292d section of the Code, to obtain satisfaction of his judgment. The proceeding is but a supplementary execution. By the 297th section, the judge before whom the proceedings have been instituted is authorized to direct the application of "any property of the judgment debtor" to the satisfaction of the judgment. In respect to the joint property of the defendants, they are the judgment debtors. In respect to the separate property of the defendant served, he is the judgment debtor. This is declared to be the effect of the judgment. The proceedings therefore embrace the joint property of the defendants, and the separate property of the defendant, who had been served with process. This, too, is in analogy with the former practice, where, upon the return of an execution issued upon a judgment against joint debtors upon some of whom process had not been served, a creditor's bill might be filed against them all, although the separate property of those not served could not be reached. (Van Cleef agt. Sickles, 5 *Paige*, 505; Commercial Bank of Lake Erie agt. Meech, 7 *Paige*, 448.)

Nor can I agree with the defendants' counsel that there was any irregularity in not making the defendant, Redfield, a party to the supplementary proceedings. I am inclined to think he might have been included in the order of examination. But, if so, it could only have been for the purpose of obtaining a discovery. When a creditor's bill was filed against joint debtors, it was held, that the debtor who had not been served with process was a necessary party. The reason assigned was, that his co-defendant had a right to have him before the court, to enable him, if compelled to pay the debt, to claim contribution. The practice has always seemed to me questionable, but conceding it to be proper, it cannot be applicable to the proceedings substituted in the place of the creditor's bill by the Code.

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In those proceedings, the equities between the debtors themselves are not to be regarded. There can be no decree for contribution in such a case. Certainly it does not lie with the debtor who has not been made a party to the proceedings to object that he has been thus omitted.

I have thus considered all the objections which, upon the argument of the motion, were urged against the regularity of the plaintiff's proceedings. But I think I might have spared myself this duty, by referring to the position of the defendant, in whose behalf the motion is made. Although the papers contain the usual affidavit of merits, it was conceded upon the argument, that there was no defence against the demand upon which the plaintiff has obtained judgment. The effect and object of the proceedings are, to obtain payment of a debt, the validity of which is undisputed, out of property legally and equitably chargeable with such payment. No suit against this defendant personally has been instituted. No judgment against his separate property has been obtained. Under such circumstances I do not think he has the right to question the regularity of the proceedings. The motion must be denied, but I am not inclined to charge the defendant with costs.

SUPREME COURT.

VAN RENSSELAER agt. EMERY AND OTHERS.

Where copartners dissolve partnership, and one of the partners assigns his interest in the copartnership property to a third person, the latter becomes entitled to receive the share of the surplus which, after extinguishing all debts and adjusting the equities between the partners themselves, would have belonged to his assignor. And where it is agreed that the assignee shall act with the remaining partner in the settlement of the partnership business, either has the right, as the partners would have had prior to the assignment, to apply the partnership funds and effects to the discharge of partnership debts and liabilities.

Where a *receiver* has been duly appointed under proceedings supplementary to execution, to enforce payment of a judgment against the copartnership

property, he ought not to be made a party to an action and an injunction issued restraining him in the discharge of his official trust. The proper remedy in such case is to apply to the court for instructions.

The receiver, when regularly appointed, becomes entitled to the possession of the debtor's property. The effects thus in his possession are deemed in the possession of the court. To enjoin a receiver, under such circumstances, from taking possession of the property, is but to restrain the court itself from making the proper disposition of the funds which may come into the receiver's hands.

At Chambers, February, 1854. Motion to dissolve injunction. The complaint states that the defendants, Henry D. Emery and James Redfield, for several years had been copartners in business, in the city of Albany, under the firm of Emery and Co., that the copartnership was dissolved on the 10th of December, 1853, at which time the plaintiff was liable for the copartnership as surety or endorser to an amount exceeding thirty thousand dollars, and for the defendant, James Redfield, to the further amount of about seven or eight thousand dollars.

It is further stated, that on the day on which the copartnership was dissolved, Redfield assigned and transferred to the plaintiff all his interest and share in the property of the firm, including books, accounts, and demands of every description, and it was agreed between the partners and the plaintiff, that the business of the firm should be settled by the defendant, Henry D. Emery, and the plaintiff, or an agent to be appointed by him, jointly; that Christopher W. Bender was appointed such agent, and he, with Henry D. Emery, took possession of the copartnership effects, and made an inventory thereof, and commenced the settlement of the business.

It is further stated in the complaint, that on the 31st of December, the defendants, Henry D. Emery, George W. Emery, and Austin S. Kibbe, together with Horace L. Emery, entered the store which had been occupied by the firm, and removed the books and papers, and that the defendant, Austin S. Kibbe, had them in his possession, and claimed to be entitled, as a receiver, to the sole control of the books, accounts, and debts, and refused to allow the plaintiff, or his agent, to have access thereto, or in any way to participate in the management of the property; that the defendant, Kibbe, claimed to have

been appointed a receiver upon certain proceedings supplementary to execution in two actions in which judgments had been recovered against Henry D. Emery and James Redfield, as joint debtors, no process having been served upon Redfield in either case, and in which judgments had been entered upon an offer or consent signed by Henry D. Emery alone, in the name of the firm of Emery and Co., and without the consent of the defendant, Redfield.

The plaintiff also states, that the defendant, George W. Emery, was in no way a creditor of the firm when the dissolution took place, but that since that time he had obtained an assignment of the demands upon which his judgment had been confessed.

It also appeared that the defendants, Henry D. Emery and James Redfield, had, before the dissolution, confessed a judgment in favor of the plaintiff for \$18,800, upon which, on the 16th of December, an execution was issued and levied upon the personal property of the firm, and that, upon a sale of the property so levied upon, an amount nearly sufficient to satisfy the judgment had been realized.

Some other facts are stated in the complaint and the affidavits read upon the motion, but they are not material to the questions decided.

Upon the complaint and the affidavits verifying the material allegations thereof, an injunction was allowed by the county judge, restraining the defendants, Henry D. Emery, James Redfield, and George W. Emery, from collecting or receiving, or in any way interfering with any debts, demands, accounts, &c., which belonged to the firm of Emery and Co., at the time of its dissolution, and also restraining the defendants last named, and also the defendant, Austin S. Kibbe, from disposing of, selling, transferring, paying, or applying said debts, accounts, &c., in any way, until the further order of the court. A motion was made on behalf of the defendants, Austin S. Kibbe, George W. Emery, and Henry D. Emery, to dissolve or modify the injunction.

C. M. JENKINS, for Plaintiff.

T. C. SEARS, for Defendants.

HARRIS, Justice. Upon the dissolution of the partnership, it became the primary duty of the partners to wind up its affairs. For this purpose either partner might collect debts due to the partnership, and apply the partnership effects to the discharge of partnership liabilities. By the assignment from Redfield to the plaintiff, the latter succeeded to the interest of the former in the partnership estate. He became entitled to receive the share of the surplus which, after extinguishing all debts and charges, and adjusting the equities between the partners themselves, would have belonged to the assignor. (*Story on Partnership*, § 322, 326, 328, 341.) By virtue of the agreement between the partner, Emery, and the plaintiff, at the time the assignment was made, the plaintiff was to act with Emery in the settlement of the partnership business. Either would have had the right, as either partner would have had but for the assignment to the plaintiff, to apply the partnership funds and effects to the discharge of the partnership debts and liabilities. The fact that this has been done by the partner, Emery, without the consent, or even the knowledge of the plaintiff, if it has been done in good faith, furnishes no just ground of complaint. In doing so, he has but executed what was the duty of both parties, which was to wind up the partnership concerns by satisfying the debts and charges against it, and thus prepare for an equitable division of the surplus.

I think, too, the injunction against Kibbe should not have been granted. It has already been held that the judgment and proceedings under which he was appointed receiver were regular. See *Emery agt. Emery*, (*ante*, p. 130.) As such receiver he is the officer of the court, or, as he has been aptly called, "the hand of the court." (1 *Barb. Ch. Pr.* 658.) He is subject to the order and control of the court. The proper mode of restraining such an officer when engaged in the discharge of his official trust is by application to the court for instructions, and not by making him a party to an action and obtaining an injunction against him.

But waiving this objection, I think the injunction ought not to be continued as against the receiver. Judgments have been

recovered against the copartnership which are valid as against the copartnership estate. The defendant, Kibbe, has been appointed a receiver upon proceedings had upon those judgments, in the manner prescribed by law. When his appointment was perfected, by giving the requisite security, he became entitled to the possession of the partnership effects. The effects, thus in his possession, are deemed to be in the custody of the court, and will not be disposed of, it is to be presumed, without a hearing of all the parties who have a right to be heard. To enjoin the receiver, under such circumstances, is but to restrain the court itself from making the proper order for the disposition of the funds which may come into the hands of its officer.

As against the defendants, George W. Emery and Austin S. Kibbe, therefore, the injunction must be vacated with costs of the motion, to abide the further order of the court. As against the defendant, Henry D. Emery, the injunction was properly allowed. Where, upon the dissolution of a partnership, the partners cannot agree upon the mode of closing its affairs, it is the practice of a court of equity, with a view to the protection of all who are interested, to exclude all the partners from any participation in the business of closing it up, and appoint a receiver for that purpose. The plaintiff having, with the consent of Henry D. Emery, been admitted to the rights of Redfield, has the same right that Redfield would have had to exclude Emery from the management of the partnership concerns, and to have a receiver appointed, so that the business may be wound up under the direction of the court. As to the defendant, Henry D. Emery, therefore, the motion must be denied, with costs of opposing the motion, to abide the further order of the court.

SUPREME COURT.

HOLLISTER agt. LIVINGSTON.

An amendment of a complaint by introducing substantially new causes of action, is not allowable of course, under § 172 of the Code.

If such an amendment is sought to be made under that section, the remedy of the defendant is by refusing to accept, or returning the paper, or giving notice that he will disregard it, specifying on what ground.

Receiving the paper and retaining it sixteen days without such notice is a waiver of the defect.

Obtaining an order extending the time to answer an amended complaint is also a waiver of such a defect.

Ontario Special Term, April, 1854. The complaint in this action was upon a note under seal, and was served the 5th of January, 1854. The answer of the defendant setting up the defence of usury only, was served the 18th of February. On the 6th of March the plaintiff's attorney, without special leave obtained from the court, served on the defendant's attorney an amended complaint, containing, in addition to a count on the note embracing the substance of the original complaint, two other counts for further causes of action, one upon an indebtedness for work and labor, goods, wares, and merchandises, moneys lent and advanced, and moneys had and received; the other a count upon an account stated. On the 22d of March the defendant's attorney served on the plaintiff's attorney, with a copy of an affidavit stating the facts, a notice of this motion, which is for an order setting aside the amended complaint, or striking out the last two counts, or for other or further relief, with costs. The next day an order was procured by the defendant's attorney and served on the plaintiff's attorney, extending the time to answer the amended complaint twenty days from that date.

J. R. COX, *Attorney*; P. BRONSON, *Counsel for Defendant*.
D. WRIGHT, *Attorney for Plaintiff*.

T. R. STRONG, Justice.—It was well settled under the 8th rule of the court of April term, 1796, which allowed amend-

ments of course to declarations and pleas in certain cases, without any restriction in terms as to the nature or extent of the amendments, that an amendment by adding a new count or plea could not be made. (Siver agt. Smith, 18 *Johns.* 310; Benedict agt. Ripley, 5 *Cow.* 87; Wiley agt. Moore, 2 *Wend.* 259; 1 *Dunlap's Prac.* 695.) By subsequent rules of the court, it was at one time provided that a new count or plea might be added by amendment of course, and at another period such an addition by amendment without leave on special application was prohibited. (*Graham's Prac.* 1st ed. 528, 2d ed. 658; 1 *Paine and Duer's Prac.* 429; 1 *Burrell's Prac.* 138, 369, 176, 418; *Rule 23 of Rules* of 1847.) The Code, § 172, authorizes one amendment of any pleading by the party of course, within the period and under the limitation therein specified, and like the rule of 1796, does not in terms impose any restriction in respect to the character or extent of the amendment. I think, however, that it is fairly to be implied under the Code, as it was under the rule, that the amendments made shall be confined to the matter of the original pleading; that the decisions under that rule are equally applicable under the Code; and that amendments cannot now be made of course by introducing substantially new causes of action. (Field and Stone agt. Morse, 8 *How.* 48.) Amendments are allowable by adding or striking out allegations to any extent, provided no new cause of action in substance is added. The form of action, having reference to the forms under the old system, may be changed from trover to trespass, case to assumpsit, or any form of action to another, if no new cause of action is introduced. (Garlock agt. Bellinger, 2 *How.* 43; Dows and Cary agt. Green and Mather, 3 *How.* 377; Chapman agt. Webb, 6 *How.* 390; *Code*, § 173, as amended in 1852; Field and Stone agt. Morse, above cited.)

The amendments in the present case consist of further and additional causes of action, and according to the foregoing views were made without authority. Still, I am of opinion that this motion cannot be granted, for two reasons.

First. It was the duty of the defendant's attorney, if he would avail himself of the objection, to refuse to accept, or to return

the amended pleading, or give notice that he should disregard it, specifying on what ground. That was an ample remedy for the defendant, and one which would work the least harm to the plaintiff. No motion was necessary. By omitting to pursue that remedy, and retaining the paper from the 6th to the 22d of March, without giving notice that advantage would be taken of the defect, I think the defect was waived. (The City of Buffalo agt. Scrantom, 20 *Wend.* 677; Wirts agt. Norton, 25 *Wend.* 699; Platner agt. Johnson, 3 *Hill*, 477; Wright agt. Fobes, 1 *How.* 240; The Cortland County Mutual Insurance Co. agt. Lathrop, 2 *How.* 146; Knickerbocker agt. Loucks, 8 *How.* 64; Baker agt. Curtis, 7 *How.* 478.) The cases of Griffin agt. Cohen, and Rogers agt. Rathbun, 8 *How.* 451, 466, differ from the present. In those the amendments made were such as the statute authorizes, and whether they were allowable or not depended upon the motive with which they were made, and the effect of them in reference to delay. Here the objection is, that the statute does not authorize such an amendment. But I do not desire to be regarded as intimating an opinion either way in reference to the leading doctrine in those cases. They were rightly decided independent of that doctrine.

Second. Obtaining the order extending the time to answer the amended pleading was a recognition of the pleading and its regularity, and as such was a waiver of the objection to it, and a bar to this motion, of which notice had then been given. (Bowman agt. Sheldon, 5 *Sand. S. C. R.* 662, 668.)

The motion must be denied, with \$7 costs; but the defendant may have twenty days after service of a copy of the order on this decision, or of notice thereof to answer, on payment of said costs.

Wisner, by her next friend, agt. Teed and others.

SUPREME COURT.

WISNER, BY HER NEXT FRIEND, agt. TEED AND OTHERS.

An *answer* containing new matter which does not constitute a *counter claim*, may, nevertheless, be *demurred* to for *insufficiency*. (See *Salinger agt. Lusk*, 7 *How. Pr. R.* 430, which holds the same doctrine; and *Simpson agt. Loft*, 8 *id.* 234; and *Roosa agt. Saugerties and Woodstock Turn. Co.* *id.* 237 *adverse*.)

Where, by the will of the testator, one-sixth part of the real estate vested in one of the son's, subject to the widow's right of dower, which had never been admeasured or set apart; and a judgment against the son having been obtained prior to the death of the testator,—*held*, that on the death of the testator the lien of the judgment upon the son's portion attached *eo instanti*; and it was no answer in an action of partition, to set up that the testator, at the time of his death, held notes and obligations against the son more than sufficient to balance the amount of the son's portion of the property—it not appearing that the amount paid to the son, by the testator, was by way of advancement.

Livingston Circuit and Special Term, October, 1858. Demurrer to answer. The action is brought to obtain partition of certain lands in the town of Leicester, in the county of Livingston.

The complaint states, that Pell Teed, late of the town of Leicester, in the county of Livingston, deceased, was in his lifetime seized in fee simple of certain real estate, situated in the town and county aforesaid, describing the same particularly. That said Pell Teed being so seized of the said real estate, died on or about the first day of September, 1851, leaving Achsa Teed, his widow, and Eunice Priest, now the wife of Erastus Priest, Caroline Teed, Minerva Wyman, Pell Teed, jr., Louisa Teed, Fidelia Dinsmore, and Achsa M. Teed, his children, and heirs at law, all of whom, excepting the said Pell Teed, jr., are made defendants in this action.

That the said Pell Teed, before his death, and on the 11th day of August, 1851, executed his last will and testament, by which he devised the said real estate as follows: One undivided third part to his widow, Achsa Teed, and all the rest and residue thereof in equal undivided portions to his said children, which said will has, since the death of the said Pell Teed, been duly proved and recorded.

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That on the 27th day of March, 1843, Lewis Benedict recovered judgment against the said Pell Teed, jr., for \$192,64, damages and costs, which was duly docketed in the clerk's office of Livingston county, on the 27th day of March, 1843.

That on the 12th day of January, 1852, all the right, title, and interest of the said Pell Teed, jr., in and to the said real estate was sold by the sheriff of Livingston county, by virtue of an execution issued upon said judgment, at which sale the plaintiff became the purchaser of the said real estate, for the sum of \$381, being the highest sum bid, &c.

That after the expiration of fifteen months from such sale, and on the 13th day of April, 1853, the plaintiff became seized in fee of the equal undivided sixth part of two-thirds of the said real estate not devised to the said Achsa Teed, widow of the said Pell Teed, the right, title, interest, and undivided share of the said Pell Teed, jr.

That the dower of the said widow, in the said premises, has never been admeasured or in any way set apart to her from the estate of the said Pell Teed, deceased.

The complaint then demands judgment of partition, &c.

Among other defences interposed by the answer is the following: After setting out the will of Pell Teed, deceased, so far as it relates to the devise of the lands in question, the same as stated in the complaint, and showing that he also bequeathed to Achsa Teed (now his widow) all his household furniture of which he should die possessed, and that the bequest to his children was of all the rest and residue of his estate, both real and personal, after payment of his just debts and funeral charges, to be equally divided between them, share and share alike, denies that the said Pell Teed, deceased, by his last will and testament, disposed of his estate, either real or personal, in any other manner. It then states, that a part of the said personal estate so bequeathed to his children consisted of one or more promissory notes or other obligations, executed by the said Pell Teed, jr., to the said Pell Teed, deceased, in his lifetime, for money paid and advanced by said Pell Teed, deceased, in his lifetime, to and for the said Pell Teed, jr., and at his request,

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and which at the time of the death of the said Pell Teed, deceased, remained due, and unpaid, and unsatisfied, otherwise than by the said devise and bequest, which said promissory note or notes and obligations amounted at the death of the said Pell Teed, deceased, to more than the sum of one thousand dollars, being more than the one-seventh part in value of the estate so devised as aforesaid to the children of the said Pell Teed, deceased, which said Pell Teed, jr., was at the time of the death of the said Pell Teed, deceased, and still is wholly unable to pay either in whole or in part, except by applying so much of them as the said share of the said estate so devised to him, the said Pell Teed, jr., by the said Pell Teed, deceased, would amount to in satisfaction of his devise or bequest.

To this answer the plaintiff demurs, assigning various causes of demurrer, among which is, that it does not state facts sufficient to bar the plaintiff from maintaining her action.

R. P. WISNER, *for Plaintiff.*

F. TRACY, *for Defendants.*

WELLES, Justice. A preliminary objection is raised by the defendants' counsel, that a demurrer does not lie to an answer unless the answer contains new matter constituting a counter claim, and that this answer does not contain such matter.

The Code (§ 153) provides, that when the answer contains new matter constituting a counter claim, the plaintiff may, within twenty days, reply to such new matter, &c., or he may demur to the same for insufficiency, &c. This is the only provision of the Code allowing, in express terms, a demurrer to an answer, from which it is contended that the answer must amount to a counter claim, in order to authorize the plaintiff to test its sufficiency by a demurrer. Looking at the section by itself, and regarding its grammatical construction, this view, to say the least, is plausible. I incline, however, to think, in view of other sections, and the evils and inconveniences to which such a construction would lead, that it was not so intended. Section 154 declares, that if the answer contains a statement of new matter,

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constituting a *defence*, and the plaintiff fail to reply or *demur* thereto within the time prescribed by law, the defendant may move for judgment. Here a demurrer by the plaintiff is contemplated where the answer contains a defence of new matter, and is not confined to an answer containing a counter claim. I cannot believe that the legislature intended to deprive a plaintiff of the right to demur to an answer setting up new matter, unless the same constituted a counter claim. Such answer could not be struck out on motion, under § 152, unless it was sham or irrelevant, nor under § 160, unless it was irrelevant or redundant, nor under § 247, unless it was frivolous; and if it was neither, and did not in the judgment of the plaintiff state facts sufficient to constitute a defence, which is not an uncommon occurrence, the consequence might be, that the plaintiff, if he could not demur, would be subjected to the delay and expense of going to trial upon an issue of fact, which would determine nothing, and leave the parties just where they were before the answer was put in. Sections 248, 249, 250, and 252, inform us what issues of fact and of law are, and how they arise. § 248 declares that an issue of law arises on a demurrer to the complaint, answer or reply; and § 155 expressly allows a demurrer to a reply. No reason can be conceived for allowing a demurrer to a reply for insufficiency, and not to an answer for the same cause. Indeed, there is no way of testing the sufficiency of either by the court, unless it be sham, irrelevant, redundant, or frivolous, except through a demurrer. Suppose the parties go down to trial upon an answer which the defendant conceives to be insufficient. What, I ask, is there to try at the circuit? Clearly no question of fact, because the plaintiff does not wish to dispute, and does not dispute the facts stated in the answer. There is then nothing to try but an issue of law, which § 248 declares arises on a demurrer to the complaint, answer, or reply, and which, by § 258, must be tried by the court. Yet, in such case, by force of § 168, the answer is to be deemed controverted by the adverse party, and the action goes to trial as an issue of fact, when, in reality, there is no fact in dispute, and the only controversy between the parties is

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upon the sufficiency of the answer, and that question must in many cases, by § 258, *be tried by a jury*.

I am aware that this question has been involved in some conflict of decision at special terms. In *Salinger* agt. Lusk, (7 *How. Pr. R.* 430,) Justice BARCULO held that a plaintiff might demur to an answer not containing a counter claim for insufficiency; and in *Simpson* agt. Loft, (8 *How. Pr. R.* 234); and *Roosa* agt. The Saugerties and Woodstock Turnp. Co. (*Id.* 237.) Justice HARRIS held the contrary, and that a demurrer can be interposed to an answer, *only* when the answer contains new matter constituting a counter claim, and that a demurrer to an answer which does not contain a counter claim is a nullity. It will be seen by reference to the last two cases, that the learned justice places his opinion upon § 168, and he remarks in one of them, that "under the Code, as amended in 1852, there can be no demurrer to an answer unless it contain matter constituting a counter claim." In this view I cannot coincide. There is nothing in the section last referred to, which, in my judgment, compels us to such conclusion. Its language is permissive, and not imperative in form of expression, and I think the intention was, simply to relieve the plaintiff from the necessity of replying, where he wished to controvert upon the trial the new matter stated in the answer. It is not declared that he may not demur to the answer. In this way full scope may be given to the provisions of the section, without denying the plaintiff the right to bring the question of the sufficiency of the answer directly before the court by a demurrer, and thus avoid the confusion and inconvenience, not to say absurdity which I have attempted to point out as the consequence of the opposite view.

This brings us to the consideration of the question presented by the demurrer in the present case, and upon that question I entertain no doubt. The answer, most clearly, does not contain facts sufficient to constitute a defence.

Upon the death of Pell Teed the testator, one-sixth part of the real estate in question vested under his will in his son, Pell Teed, jr., subject to the widow's right of dower, which has

never been admeasured or set apart. The plaintiff has become seized of the said one-sixth, as tenant in common with the other children, and entitled to ask for partition. It is not alleged, nor does it anywhere appear, that the monies received by Pell Teed, jr., from the testator, his father, were paid to him by the latter by way of advancement. The fact of notes and obligations having been given for it, is evidence to the contrary. It is therefore an ordinary simple contract debt, due from Pell Teed, jr., to the estate of his father.

Upon the vesting of the said one-sixth of the lands in question in Pell Teed, jr., the lien of the judgment through which the plaintiff claims, attached, *eo instanti*, and her title relates back to that lien, and nothing is shown by the answer to impair it.

There must be judgment for the plaintiff on the demurrer, with leave to the defendants to amend the answer demurred to, on payment of costs.

SUPREME COURT.

FERO agt. VAN EVRA AND OTHERS.

Where the plaintiff brought his action to compel the defendant to make or acknowledge satisfaction of a mortgage, and the defendant served notice that judgment might be entered as prayed for in the complaint, which was accordingly done,—*held*, on motion by the plaintiff, for an order to compel the defendant to execute such satisfaction, that such a motion was unnecessary.

The judgment (if correctly entered) contained the proper order, and the mode of enforcing it was by proceeding under § 285. The defendant should be served personally with a copy of the judgment. A transcript served on the defendant's attorney, with a personal demand from the defendant was insufficient.

Montgomery Special Term, February, 1854. Motion for an order to compel James R. Van Evra to cancel or satisfy a mortgage. An action was commenced requiring such satisfaction, and defended; and after answers defendant withdrew his answer and served a notice that plaintiff might take a judgment as

prayed for in the complaint. Judgment was entered and roll filed, and notice of the entry and filing of the judgment served *on defendant's attorney* two or three days afterward. Defendant and his attorney have been frequently asked for a satisfaction of the mortgage, so that it could be discharged of record, but they have neglected to procure and furnish it, and defendant, who had assigned the bond and mortgage to one Failing, said he had nothing to do with it. No notice of the judgment had been served on the attorney or the defendant, except a certified transcript of a judgment docketed in the Montgomery county clerk's office, on the 25th of March, 1858, in favor of plaintiff and against defendants, for \$32,21; showing no other fact, or that a judgment had been entered requiring defendant to make satisfaction of the mortgage, but a notice was endorsed on said transcript, directed to the defendant's attorney, that a satisfaction of the mortgage in controversy "*in this cause*" was required to be made by the defendant, James R. Van Evra, to the plaintiff, so that the same might be cancelled of record.

GEO. SMITH, *for Plaintiff.*

MITCHELL & ELY, *for Defendant.*

C. L. ALLEN, Justice. The notice of motion is for a rule or order to compel the defendant, James R. Van Evra, to cancel or satisfy the mortgage referred to in the bill of complaint in this action, of record. The plaintiff, if he has entered up his judgment correctly, pursuant to the stipulation served by the defendant's attorney, has such an order in his judgment roll, and all he has to do is to proceed under § 285 to enforce his judgment. That section provides, that if the judgment requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt.

The plaintiff should furnish to, and serve on the defendant, Van Evra, a copy of the judgment, not merely the transcript containing the amount of the costs, but a copy of that part of

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the judgment requiring him to make or acknowledge satisfaction of the mortgage, and require satisfaction to be acknowledged according to the order. If that is refused, he is then prepared to proceed against him as for a contempt. Here he has only served the attorney with a copy of the transcript of the judgment, with a notice to *them* that satisfaction is required. It is true, he has called upon the defendant *personally* and demanded satisfaction, but this is not sufficient within § 285. A copy of the judgment must be served.

The motion must be denied, with \$7 costs.

SUPREME COURT.

LANE agt. GILBERT.

Where a defendant does not, in his answer in an action for assault and battery take a direct issue upon the fact, whether an assault was or was not committed, but merely states matter controverting the degree of aggravation by which it was characterized, the plaintiff's remedy is to move for judgment under § 247 of the Code, on account of the frivolousness of the answer.

If a defendant cannot take issue in such action upon the material allegations in the complaint, either by denial or justification, he should not answer at all. He can give in evidence his mitigating circumstances before a sheriff's jury on an assessment of damages.

Albany Special Term, February, 1854. Motion to strike out matter as redundant or irrelevant. The action is for an assault and battery. The defendant in his answer states, that "the plaintiff is a tailor by trade, and keeps a shop in Broadway, in the village of Saratoga Springs; that on the 21st of January, 1854, the defendant entered the said shop for the purpose of transacting certain business with the said plaintiff, as he lawfully might do; that while in the said shop engaged in transacting such business with the plaintiff, he, the plaintiff, without just cause, addressed abusive, insulting, and inflammatory language to the defendant, and without just cause commanded the defendant to go out of the shop; that the defendant did there-

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upon immediately go out of the said shop on the sidewalk of Broadway aforesaid; that the plaintiff then followed the defendant out of the shop, and came close to him on the sidewalk, and, with a threatening and daring manner, addressed insulting language to the defendant, all without just cause; that, thereupon, the defendant, without any intent to commit an assault and battery, but for the purpose of cautioning the plaintiff, gently extended his hand toward the plaintiff, but has no knowledge that he touched him, but says, that if he did touch the plaintiff, it was only by gently laying his hand on the lappel of his coat for the purpose of cautioning him, as he had a right to do; and the defendant denies each and every allegation in the complaint, except as herein above admitted and explained." The plaintiff moved to strike out the whole of the answer, except the last clause commencing with the words, "and the defendant denies," upon the ground that it is redundant or irrelevant.

A. BOCKES, *for Plaintiff.*

J. B. M'KEAN, *for Defendant.*

HARRIS, Justice. The plaintiff has stated, as his cause of action, that the defendant violently assaulted and beat him. The defendant, if he would interpose a legal defence, was required either to deny some allegation in the complaint essential to the cause of action, or, if he could not do this, to state some new matter in justification of what he had done. Has he done either? If I have understood the import of the answer it amounts to this, that the defendant had no intention to commit the alleged assault and battery, and whether he did so in fact, he is unable to say. But, conceding that he did, it was a very slight affair, and whatever more is stated in the complaint is untrue. In other words, the defendant has not felt himself at liberty to take issue upon the fact whether an assault was or was not committed, but has merely controverted the degree of aggravation by which it was characterized.

The defendant, being required, as he was, to answer upon oath, could probably do nothing more, nor could he legally do

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this. If he could neither deny nor justify the charge, he had no defence, and, of course, should not have answered at all. The mitigating circumstances alleged in his answer might very properly be proved before a sheriff's jury upon the assessment of the plaintiff's damages. They could not be made the subject of an issue upon which the parties might go to a trial.

I think the plaintiff has mistaken his remedy, in moving, as he has, to strike out a part only of the answer as redundant or irrelevant. The effect of his motion, if granted, would be to leave the defendant with an unintelligible fragment of an answer, and no issue capable of trial. A trial upon such pleadings would be but a mere assessment of damages.

Under these circumstances I think the motion should be denied, with liberty to the plaintiff, if the defendant shall not, within ten days after notice of this decision, serve an amended answer, which he is to have liberty to do, to move for judgment under the 247th section of the Code, on account of the frivolousness of the answer. Neither party to have costs upon this motion.

OSWEGO COUNTY COURT.

MATTISON, Respondent, agt. JONES, impleaded with Box, Appellant.

The former practice under the Revised Statutes, as to writs of error, does not apply in cases of *appeal*, under the Code.

Under § 325 and 366 of the Code, any one of several parties conceiving himself aggrieved by the judgment, may *appeal*, whether his co-plaintiffs or co-defendants join in the appeal or not.

January Term, 1854. Motion by the respondent to dismiss the appeal. The action was brought before a justice of the peace for a tort against both defendants. On the trial the plaintiff withdrew the action as to Box, but the justice, through mistake, rendered judgment in *form* against both defendants. The defendant, Jones, has undertaken to appeal without join-

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ing Box in his notice. The respondent now moves to dismiss the appeal for the non-joinder of Box.

S. C. HUNTINGTON, *for the Motion.*

D. A. KING, *Opposed.*

TYLER, County Judge. The 825th section of the Code, which is applicable to this case, reads as follows: "Any party aggrieved may appeal in the cases prescribed in this title." Section 866 of the Code provides, that in "giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact." Previous to the Code, the provision for reviewing a justice's judgment upon *certiorari*, was as follows: "Either party thinking himself aggrieved by such judgment, may remove the same by writ of *certiorari*." (2 R. S. 3 ed. 350, § 171.) By section 185 of the same article, it was provided, that the court might "affirm or reverse the judgment in whole or in part." It will be observed by the provision of the Code, that the judgment may be affirmed or reversed, "as to any or all the parties," was not contained in the Revised Statutes. The provision with respect to writs of error was as follows. "If there be several persons against whom any judgment shall have been recovered, and entitled to bring a writ of error thereon, living at the time of bringing such writ, they shall all join in such writ." (2 R. S. 685, § 7.) The Code contains no such provision with respect to an appeal. But if the practice on appeals is to be the same as formerly on *certiorari*, all of the parties against whom the judgment is rendered must be joined in the appeal. One of two defendants could not alone sue out a *certiorari*. (11 Wend. 174.) The court in the case cited, held that the practice as to a writ of error was applicable to a *certiorari*. But is the practice which governed a writ of error applicable to an appeal under the Code? I observe that Mr. Monell in his new Practice, intimates his opinion that the statute relative to the writ of error must apply to an appeal, and he has therefore transcribed such statute into his work. On the contrary, I find that in the last edition of the Revised Statutes,

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the entire article entitled, "Of writs of error," is left out, and in its place the provisions of the Code are given in relation to appeals. This would seem to indicate the opinion of the learned compilers, that the former practice as to writs of error does not apply in cases of appeal under the Code. Besides, section 828 of the Code expressly abolishes writs of error in civil actions, and provides, that "the only mode of reviewing a judgment or order in a civil action shall be that prescribed by this title."

On the whole I am of the opinion that this motion must be decided independent of the statute in regard to writs of error. The only remaining question therefore is, does the Code require that the two defendants should have joined in the notice of appeal? There is no provision of the Code like that in the Revised Statutes, *expressly* requiring all of the defendants to join. The language is, "any party aggrieved may appeal." It cannot be said that one of the defendants is not a party, and I can imagine cases where the judgment might be against two, and yet only one be "aggrieved." The action may be for a tort, and the evidence show clearly that the plaintiff is entitled to recover against one of the defendants, and just as clearly that he is not entitled to recover against the other, but the justice renders judgment against both. Now, in such case, the law would consider only one of the defendants "aggrieved," and should both join in an appeal, the judgment would be affirmed as to one, and reversed as to the other. One must incur the expense of the appeal without benefit to himself, while the other must submit to an unjust judgment if the appeal is not brought. The rule in such case, that both defendants must join or not have the privilege of an appeal, would operate unjustly to one and compel him to submit to a wrong, or involve his co-defendant in the costs of the appeal. Taking sections 825 and 866 in connection, I am of the opinion that any person aggrieved by a judgment against himself and co-defendants, ought to have the benefit of an appeal, whether any other party sees fit to join him or not. This I think to be according to the spirit of the Code upon the subject, and so I am inclined to construe it.

The motion must be denied, but as the question is new under the present practice, it must be without costs.

COURT OF APPEALS.

THE PEOPLE agt. JOHN HENDRICKSON, jr.

The testimony of a person examined as a witness before a coroner's jury, such person not being at the time under arrest or charged with crime, may be given in evidence against him on his subsequent trial for the alleged murder of the deceased.

The witness in such case stands on the same footing as witnesses on the trial of issues. He is not bound to criminate himself, and may decline to answer as to whatever tends to do so; and if he fail to avail himself of his privilege, his answer will be deemed voluntary, and may be given in evidence against him. It is only when he is compelled to answer after having declined to do so, that the answer will be deemed compulsory, and will be excluded.

On the trial of a prisoner for the murder of his wife, the prosecution was permitted to introduce in evidence the will of the father of the deceased, by which it appeared that the testator devised all his property to his wife for life, and after her death to his three children in unequal proportions, the one to take one-half, and the deceased one-fourth, and her sister one-fourth—*held*, that such evidence was properly admitted as bearing upon the question of motive.

JOHN K. PORTER, *for Prisoner.*

HAMILTON HARRIS, *for People.*

By the Court—PARKER, Judge. The wife of Hendrickson died on Sunday, the 6th of March. On the evening of the next day a coroner's inquest was held, before which Hendrickson was sworn and examined as a witness. He stated the circumstances attending the death of his wife. When interrogated as to his having been in Albany, he said he had been there "two weeks ago last Saturday;" and when asked if he had not been there since, he said, "O, yes, I believe I was there a week ago last Saturday," as if correcting himself; and on being further interrogated, said, "I was there last Saturday." He further stated the object of his going to Albany, and mentioned several places in the city where he had been, but said he did not remember having been into Springstead's drug store or any other drug store.

Upon the trial at the Oyer and Terminer, the counsel for the prosecution offered to prove the statement so made at the coroner's inquest. The counsel for the prisoner objected to the

evidence, on the ground that what the prisoner swore to on the occasion was not a voluntary statement. The objection was overruled and the evidence received, to which the counsel for the prisoner excepted; and the alleged erroneousness of that decision constitutes the first ground on which the prisoner relies for a reversal of the judgment.

I. The general rule is, that all a party has said which is relevant to the questions involved in the trial, is admissible in evidence against him. The exceptions to this rule are where the confession has been drawn from the prisoner by means of a threat or a promise, or where it is not voluntary, because obtained compulsorily or by improper influence. It is not claimed in this case, that the statement in question was obtained by means of any promise or threat, or by any inducement whatever; nor is it supposed that there was any compulsion or any influence affirmatively exercised upon the mind of the prisoner, beyond what is sought to be inferred from the fact, that he was required to testify as a witness. But it is contended that because he was so required to testify, upon a general inquiry into the cause of the death of his wife, his statement was not voluntary, and should have been excluded. The record shows that the objection at the trial was placed only on the ground that the statement was not voluntary.

Hendrickson was not in custody. He made no objection to being sworn as a witness, or to answering any question that was put to him. He was treated, in every respect, like the other witnesses. At the time of his examination, no circumstances had been developed warranting a suspicion against him. The *post mortem* examination did not take place till the next day, and it was not until the second day after his testimony before the coroner's inquest that he was arrested under a warrant issued, not by the coroner, but by a police justice of the city of Albany. His statement as a witness was in no respect an admission of guilt. On the contrary, it was a denial of material facts attempted, on his trial, to be established by other witnesses. His testimony was calculated to ward off suspicion from himself, not to attract it toward him.

The question presented, therefore, is, whether, under the circumstances, the statement of a witness is to be excluded on the ground that it was not voluntarily made.

Several English *nisi prius* decisions were cited on the argument, which it is necessary to examine.

Merceron's case, (2 *Starkie*, R. 366,) decided in 1818, was an indictment against a magistrate for having corruptly and improperly granted licenses to public houses which were his own property. ABBOT, J., permitted the prosecution to prove what the defendant had said in the course of his examination before a committee of the House of Commons, appointed for the purpose of inquiring into the police of the metropolis, though it was objected that the statement had been made under a compulsory process from the House of Commons, and that the declarations were not voluntary.

In the case of Haworth, (4 *Carr. and Payne*, 254,) decided in 1830, it appeared that before the prisoner was charged or suspected, a person named Shearer had been examined on the charge of forgery, and that the prisoner was called as a witness against Shearer, and his deposition taken. The counsel for the prosecution proposed to read this deposition as evidence against Haworth, which was objected to. Justice J. PARKE said, "I think that I ought to receive this evidence. The prisoner was not, when he made this deposition, charged with any offence, and he might, on that as well as on any other occasion when called as a witness, have objected to answer any question which might have a tendency to expose him to a criminal charge; and not having done so, his deposition is evidence against him."

In a note by the reporter to this case, it is said, that in a case tried at Worcester, where it appeared that a coroner's inquest had been held on the body of A, and it not being suspected that B was at all concerned in the murder of A, the coroner had examined B upon oath as a witness. PARKE, J., would not allow the deposition of B so taken on oath on the coroner's inquest to be read in evidence, on the trial of an indictment afterward found against B for the same murder.

I cannot find that this anonymous case is anywhere reported

more fully. It would be much more satisfactory to know the particular circumstances of the case and the grounds for the decision. Without them, it is entitled to but little weight as authority. And so it seems to have been viewed by LITTLEDALE, Justice, in the case of Rex agt. Clewes, tried before him during the same year, and reported as to other points in 4 *Carr. and P.*, 221. In Mr. Greaves's note *id.*, 2 *Russ. on Crimes*, 860, 7 *Am. ed.*, on the authority of his manuscript notes, he says, the grand jury asked LITTLEDALE, J., "can evidence of a prisoner who was examined on oath before the coroner as a witness be admitted as evidence against the same person, when subsequently indicted for the murder of the person on whose body the inquest was held?" LITTLEDALE, J., answered in the affirmative; when the case referred to in the anonymous note being mentioned, the judge (Littledale) directed the grand jury to receive the evidence and leave the point for discussion on the trial.

Tubby's case (5 *Carr. and P.*, 530) tried in 1833, was an indictment for burglary. Andrews, for the prosecution, proposed to read a statement made upon oath by the prisoner, at a time when he was not under any suspicion. Pendergast objected that it was a violation of the rule of law, which held that a prisoner should not be sworn. VAUGHAN, B., said, "I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it the statement of the prisoner under oath? Clearly it is not, for he was not a prisoner at the time he made it."

In Rex agt. Lewis, (6 *Carr. and P.* 161,) decided also in 1833, several persons, one of whom was the prisoner, were summoned before the committing magistrate touching the poisoning of C. No person was then specifically charged with the offence. The prisoner was sworn, and made a statement, and at the conclusion of the examination she was committed for trial. It was held that this statement was not receivable in evidence against the prisoner. GURNEY, B., said this case was quite distinguishable from that of Rex agt. Tubby, and that under the circumstances he should have agreed with his

brother VAUGHAN. "But (he said) this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, and on the very same day on which she was committed, I think it is not receivable. I do not think this examination perfectly voluntary." It has been supposed the prisoner was brought before the magistrate on a charge or suspicion of guilt, but Mr. Greaves says, in his notes, (2 *Russ. on Cr.* 857, 7 *Am. ed. note n*,) that he was counsel in this case, and that the prisoner was summoned in the ordinary way, as a person who could give some evidence touching the matter, and not because any suspicion attached to her.

In *Rex agt. Davis*, (6 *Carr. and P.* 177,) also decided in 1888, the daughter had been examined as a witness before the committing magistrate against her father, and was then committed as a joint receiver of stolen goods with him. Her statement was excluded as evidence against her on her trial by GURNEY, B., on the same ground, as in *Rex agt. Lewis*. In regard to this case, Mr. Greaves says, (2 *Russ. on Cr.* 857, *note n*, 7, *Am. ed.*,) that the ground of the decision was, not that there was a suspicion in the mind of the magistrate, or even that the prisoner might be aware that there was such a suspicion, but that the prisoner had been examined *on oath as a witness*, and says, that after the decision in the late case of *Rex agt. Wheater*, (to which I shall refer hereafter,) it may be doubted whether that was a sufficient reason for rejecting the deposition.

In *Regina agt. Wheeley*, decided in 1888, (8 *Carr. and P.* 250,) a party who was charged with murder made a statement before the coroner at the inquest, which was taken down. The paper purported that the statement was made on oath. ALDERSON, B., held on the trial of the party for murder, that the statement was not receivable, and that parol evidence was not admissible to show that no oath had in fact been administered to the prisoner. If this was a case of the examination of a prisoner, and not of a witness, as it has been understood to be by commentators, (*Russ. on Cr.* 855 and 860, and *notes*,) its correctness will not be questioned, and it can have no bearing upon the question now before us.

The next case, in order of time, was Regina agt. Wheater, (2 *Moody's Crown Cases*, 45,) decided in 1838, which was an indictment for forgery. On the trial, before COLERIDGE, J., the examination of the prisoner previously taken on oath, as a witness, before the commissioners of bankruptcy, concerning the bills alleged to be forged, was held anmissible as evidence against him. The opinion of all the judges was desired on this point, and the case was argued before all the judges, except PARK, J., and GURNEY, B., who held that the evidence had been properly received.

In Regina agt. Owen *and al*, (9 *Carr. and P.* 83,) tried in 1839, the defendants were indicted for rape. The prosecution offered to prove the statements made by Owen on oath at the inquest held on the body of the person ravished, while the defendants were in custody. The counsel for the prisoners admitted that where witnesses had been examined voluntarily, their deposition might afterward be read against them; but objected that these defendants were in custody, and cited the case of *Wheeley*, where Baron ALDERSON rejected the deposition because it was on oath and taken while in custody. But WILLIAMS, J., said, "I know that my brother ALDERSON did so; but I also know that there has been a reaction in opinion, (if I may be allowed the expression.) I shall therefore receive the evidence and reserve the point, if it shall become necessary." It is said that Baron ALDERSON, who had tried *Wheeley's* case, was in the next court, at this time, and that WILLIAMS, J., had consulted with him in an earlier part of the case. (*Joy on Confessions*, 62.)

In Regina agt. Owen and others, (9 *Carr. and P.* 238,) the same defendants were tried in 1840 for the murder of the person ravished; and GURNEY, B., refused to receive in evidence the deposition on oath of the prisoners taken before the coroner's inquest, though it must have been known they had been received on the previous trial of the same prisoners for rape. Baron GURNEY, however, cited *Wheater's* case, then recently tried before COLERIDGE, and admitted he could not, on principle, see the distinction between that and some of the other cases.

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In the later case of Regina agt. Sandys, (1 Carr. and Marsh, 345,) decided in 1841, the prisoner was tried for murder, and ERSKINE, J., admitted in evidence her deposition taken at the coroner's inquest, and reserved the point for the consideration of the fifteen judges.

All the decisions to which I have referred, except that in the case of Wheater, were made at *nisi prius*, and their general current is certainly in favor of the admissibility of the evidence in question; but to give them, or any of them, much weight as authority, it is necessary to understand the reasons that governed, and to see on what principles they are based. Without that, decisions made at the assizes, necessarily without time for consultation and examination, can avail but little in deciding a controverted question of law.

So far as the evidence was rejected on the ground that the statement was on oath, as in the case of Davis and others, it must now be regarded as settled by the decision of all the judges in Wheater's case above cited, that that of itself constitutes no objection. Mr. Joy, in his treatise on the admissibility of confessions, reviews all the decisions at *nisi prius*, apparently conflicting, and comes to the conclusion that the decision by all the judges in Wheater's case establishes the principle that a statement not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath. (*Joy on Confessions*, § 8, 62.)

It is now regarded as a well-settled rule, and recognized in the elementary books, that where a witness answers questions upon examination on a trial tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes. (2 Starkie's Ev. 50; Roscoe's Cr. Ev. 45.) Such answers are deemed voluntary, because the witness may refuse to answer any question tending to criminate him. (1 Green. Ev. § 225.) If, however, he should be compelled to answer after claiming his privilege, his answer will be deemed compulsory, and cannot be given in evidence against him.

Where the evidence offered has been rejected on the ground

that the statement was made when the prisoner was in custody charged with crime, as in Wheeley's case and Owen's case, it seems to me clear that it was properly excluded. Because these were cases of the examination of a prisoner, not of a witness. In such cases it is a *judicial* examination, and it should not be on oath, and certain precautions for the protection of the accused are always observed. In this state such examinations are regulated by statute. (2 R. S. 2 ed. 794.) But neither is the statute, nor were the common law rules of which it is declaratory, applicable to any examination except that of a person brought before a magistrate on a charge of crime. All other examinations are classified as *extrajudicial*, (*Green. Ev.* 216,) and are to be conducted like other cases of the examination of witnesses.

It is evident that in deciding the case of Lewis, above cited, the mind of the presiding judge was influenced to some extent by the supposition, that the facts peculiar to it gave to the testimony the character of a judicial examination, for Baron GURNEY lays stress upon the facts that the deposition was made at the same time as all the other depositions on which she was committed, and on the same day on which she was committed. In both these resemblances to a judicial examination, the case of Lewis differs from that now before us; for Hendrickson was arrested on a complaint made before a different magistrate, and on a subsequent day. It is unnecessary, therefore, to express an opinion as to the soundness of the reasons given by Baron GURNEY for his decision in the case of Lewis.

The examination of a witness before a coroner's inquest bears even less resemblance to a judicial examination than that taken before a committing magistrate or a grand jury. A coroner's inquest may be held in all cases of sudden death, but an examination before a committing magistrate or a grand jury takes place on complaint made that a crime has been committed. It is only where a person is charged with crime and is examined with regard to the truth of such charge, that his examination can be considered judicial.

In the case of the State agt. Broughton, (7 *Iredell's Rep.* 96.)

decided in North Carolina in 1846, where the grand jury were investigating an offence with a view to discover the perpetrator, and the person who was subsequently indicted was examined before them on oath and charged another with the commission of the offence, it was held that the examination might be given in evidence against the prisoner on the trial of his indictment. RUFFIN, Ch. J., said, however, that if the evidence given by the prisoner had been a confession of his guilt, and the grand jury had found a presentment on it, the court would have held that it could not be given in evidence against him. It is not material to the decision of this case to inquire whether the chief justice was right or not in the distinction he made between a confession and a statement not a confession, because neither in that case nor in the one now before us was there any confession. Both statements tended to turn attention away from the witness. I am inclined, however, to think the chief justice erred in the case of Broughton, in the reason assigned for his decision. For the law seems to be that the rule as to confessions applies not only to direct confessions, but to every other declaration tending to implicate the prisoner in the crime charged, even though in terms it is an accusation of another, or a refusal to confess. (*Green Ev.*, § 219, note 2, and cases there cited.) But while the decision in the case of Broughton is in accordance with the ruling in the case before us, the reason given for that decision, if it be erroneous, does not conflict with such ruling.

Independent of any supposed authority, I do not see how, upon principle, the evidence of a witness not in custody and not charged with crime, taken either on a coroner's inquest, or before a committing magistrate or a grand jury, could be rejected. It ought not to be excluded on the ground that it was taken on oath. That reason would exclude also the statements of witnesses on the trials of issues. The evidence is certainly none the less reliable because taken under the solemnity of an oath. No injustice is done to the witness, for he was not bound to criminate himself, or to answer in regard to any circumstance tending to do so. If it is a good ground of exclusion, that the

statement was made as a witness on oath, then the rule of law that protects a witness from criminating himself is of no value, and may at once be abrogated. The rule was adopted upon the supposition that the answer might be introduced in evidence against the witness. If it cannot be, the witness has no longer any reason for claiming his privilege.

Nor can the exclusion of the evidence depend on the question whether there was any suspicion of the guilt of the witness lurking in the breast of any person at the time the testimony was taken. That would be the most dangerous of all tests, as well because of the readiness with which proof of such suspicion might be procured, as of the impossibility of refuting it. Besides, the witness might have no knowledge of the existence of any suspicion, so that his mind could not be affected or his testimony influenced by it. It is only when he is charged with crime, and examined on such charge, that there is good reason for treating him as a party to the proceeding. The common law has been as tender of the rights of witnesses as of parties.

It is the policy of the common law never to compel a person to criminate himself. That policy secures as well to a witness as to a party the privilege of declining to answer. The former is supposed to know his rights—the latter is to be specially instructed in regard to them by the presiding magistrate. But if either fail to avail himself of the privilege, his answer is deemed voluntary, and may be used as evidence.

It is only upon a judicial examination, viz. : in the case provided for by statute where the prisoner is brought before a magistrate charged with crime, that the preliminaries required by statute are to be observed, and the examination taken without oath. All other examinations are *extra judicial*. The former is the examination of a party, the latter of a witness. In all cases, as well before coroner's inquests as on the trial of issues in court, when the witness is not under arrest, or is not before the officer on a charge of crime, he stands on the same footing as other witnesses. He may refuse to answer and his answers are to be deemed voluntary, unless he is compelled to

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answer after having declined to do so ; in the latter case only will they be deemed compulsory and excluded. Applying these rules to the case before us, Hendrickson's answers before the coroner's inquest were voluntary, and were properly received as evidence against him.

II. The second ground on which the prisoner asks a reversal of the judgment is, that the will of Lawrence Van Deusen, the father of the deceased, was improperly admitted in evidence. The will was dated 1st November, 1851, and by it the testator devised all his property to his wife for life, and after her death to his three children, Lawrence Van Deusen, Maria Hendrickson, (the deceased,) and Susannah Hungerford, one moiety to Lawrence Van Deusen, and the remaining moiety to be equally divided between Maria Hendrickson and Susannah Hungerford. By the will, therefore, the deceased would have received one-fourth part of the estate after the death of her mother. This evidence was received as bearing upon the question of motive. If it tended, in the least, to show that the prisoner had been disappointed in the pecuniary expectations he had entertained from his alliance with the family, in not being able to realize them till after the death of his wife's mother, and then not in an equal proportion with the brother ; or, if it tended to show how little property he might expect from his wife, if she lived—in either case, whether the supposed motive was resentment or avarice, it was properly received. It was competent to show whether the prisoner would gain or lose by the death of the deceased, and to compare the small amount expected to be realized at a distant day with the intermediate burden of her maintenance. Taken in connection with the previous testimony, tending to show a want of affection on the part of the prisoner toward his wife, this evidence was clearly admissible. Considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind, would a motive be trifling and insignificant, which might prompt to the commission of a great crime. We can never say the motive was adequate to the offence ; for human minds would differ in their ideas of adequacy, according to their own estimate of the enor-

mity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life.

I think the evidence of the will was properly received. I was the province of the jury to determine the weight to which it was entitled.

My conclusion is, that there was no error committed on the trial, and that the judgment of the supreme court should be affirmed.

NOTE.—This decision affirms that of the supreme court, as published in 8 *Howe P. R.* 404.

Mr. Justice SELDEN delivered the following *dissenting* opinion:—

SELDEN, Judge. If we would come to a correct conclusion in this case, we must settle in the outset the fundamental principles upon which it rests. The criterion given in most of the cases by which to determine whether a declaration or confession of a person charged with crime, is competent evidence against him upon his trial, is to ascertain whether it was *voluntarily* made. If *voluntary*, it is said to be competent; otherwise not.

Now it is obvious that this is not a strictly accurate test, notwithstanding the universality of its use for the purpose. A confession or statement made upon the heel of promises of favor may be perfectly voluntary, yet it is rejected. So a statement made under oath before a coroner's jury, while the party is under arrest upon suspicion of guilt, is equally voluntary, as if made as a witness in a case with which he has no connection. He has the same protection in either case, if he chooses to avail himself of it: yet the statement in one case is admissible, in the other not; and in the former case, if, after being expressly cautioned and informed of his immunity, he is not only willing but anxious to give his testimony, it cannot afterward be used against him.

If by voluntary is meant, uninfluenced by the disturbing fear

of punishment, or by flattering hopes of favor, the expression may be accurate. But it is liable to mislead, because it suggests the idea, that the rejection of what are termed involuntary confessions flows from that principle of the common law which is supposed *mercifully* to exempt persons from all obligation to criminate themselves, and which is expressed by the maxim, *nemo tenetur prodere se ipsum*. Were it essential to the conclusion in this case, it might, I think, be shown that we are indebted for this maxim to the *justice*, and not to the *mercy* of the law; and that the principle embodied in it has its foundation in the uncertain and dangerous nature of all evidence of guilt, drawn from the statement of a party conscious of being suspected of crime.

But however this may be, it is certain that the statements of an accused person, made under oath, are never excluded on account of any supposed violation of the immunity of the party from self-crimination. The object of the law is to ascertain truth, and it rejects no evidence, come from what source it may, which is calculated to throw light upon it.

The mental disturbance produced by a direct accusation, or even a consciousness of being suspected of crime, is always great, and in many cases incalculable. The foundation of all reliance upon human testimony, is, that moral sentiment which almost universally leads men, when not under some strong counteracting influence, to tell the truth. This sentiment is sufficiently powerful to resist a trifling motive, but will not withstand the fear of conviction for crime.

Hence the moment that fear seizes the mind, the basis of all reliance upon its manifestations is gone. Speculation as to the effect of the declarations made takes the place of a regard for truth; and this too, in many cases, whether the party be innocent or guilty. If innocent, and yet conscious of the existence of circumstances tending to show guilt, there is the strongest temptation to make such statements without regard to their truth, as will serve to conceal or break the force of these circumstances. Innocent persons have not unfrequently been convicted upon *false* statements of precisely this character.

The mind confused and agitated by the apprehension of danger; cannot reason with coolness; and it resorts to falsehood when the truth would be safer, and is hurried into acknowledgments which the facts do not warrant. Neither false statements nor confessions, therefore, afford any certain evidence of guilt, when made under the excitement of an impending prosecution for crime.

So obvious and so undeniable are these principles, that it is rather to be wondered at, that the law has placed the reliance it has upon the declarations of persons accused, than that it has guarded their introduction with so much care. Few who reflect upon the matter would hesitate, I think, to concur in the sentiments expressed by Baron HOTHAM, in Thompson's case, that "too great a chastity cannot be preserved on this subject." (*Leach's C. C.* 291.)

There is a passage in Hawkins that is so pertinent to, and goes so fully to sustain the view here presented, that I transcribe it, viz.:

"The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination, or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impression of fear, *however slightly* the emotions may be implanted, is not admissible in evidence, for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

It is said by Joy, in his work on the admissibility of confessions, that this passage has been introduced into some of the later editions of Hawkins, and is no part of the original text. (*Joy on Con.*, 81.) But however this may be, it does not require the authority of Hawkins, or any other great name, to commend the sentiment of this paragraph to any thinking mind.

Mr. Justice LITTLEDALE, too, in a modern English case, expresses briefly the same idea. He says: "The object of the rule relating to the exclusion of confessions, is to exclude all

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confessions which may have been procured by the prisoner being led to suppose that it would be better for him to admit himself to be guilty of an offence, which he really never committed." (7 *Car. and Payne*, 486.)

Nothing can be clearer, indeed, than that the rule of exclusion rests, not upon the compulsory manner of obtaining the confession, but upon the dangerous and unreliable nature of the evidence; and it is truly surprising that among the numerous modern cases on the subject there should be so rare a recurrence to the original foundation of the rule; the judges in almost every instance contenting themselves with allowing the admission or exclusion of the evidence to turn upon the word *voluntary*.

That I have given the true basis of the rule is apparent, not only from the reasoning here adopted, and the authorities already referred to, but is obviously to be deduced from the mass of decisions on the subject, although not expressly asserted in them. In no other mode can they be reconciled with each other; but viewed in the light of the principles here contended for, they are rendered for the most part harmonious and consistent.

Most of the rules applicable to the reception, upon the trial of persons for crime, of their declarations made while under oath, are incontrovertibly settled. For instance, it is settled that a declaration or confession made *under oath*, while the person making it is a prisoner charged with crime, is never receivable against him upon trial for the crime. It is equally well settled, that if the declaration, although under oath, is made in a judicial proceeding, with which the person making it has no immediate connection, and which has no direct relation to the crime for which he is on trial, it is admissible.

The only question upon this particular subject, to wit: the admissibility of declarations made under oath, which is supposed to be debateable, is, whether the declarations of a person subsequently indicted, made under oath, previously to his arrest, and at a time when he was in no way judicially charged with the crime, are ever to be excluded.

The affirmative of this question is sustained by a series of authorities.

The first case to which I will call attention is that of Rex agt. Lewis, (6 *Car. and Payne*, 161.) This was an indictment, founded upon an English statute, for administering poison to one Elizabeth Davies. It appeared that on the day on which the prisoner was committed, she and several others were summoned before a magistrate, and examined on oath touching this poisoning, there being at first no *specific charge against any person*; but on the conclusion of the examination the prisoner was committed on this charge.

Upon the trial the counsel for the prosecution offered the examination taken before the magistrate in evidence, but it was rejected by Baron GURNEY, who, after referring to a case where an affidavit made by the prisoner had been received, said: "But this being a deposition made by the prisoner at the same time, as all the other depositions on which he was committed, and on the very same day, I think it is not receivable."

The next is the case of Rex agt. Davis, (6 *Car. and Payne*, 177.) This was an indictment against father and daughter for receiving stolen goods. Upon the trial it appeared that the daughter had been a witness before the magistrate, and the counsel for the prosecution proposed to ask what she there said; but the same judge, Baron GURNEY, said: "I think you cannot do that. We cannot have anything she said before the magistrate when she was a witness. If after having been a witness you make her a prisoner, nothing of what was said there can be admitted as evidence."

Now, these two cases cannot be reconciled with the notion, that the admission or rejection of such evidence depends upon the question whether the statement was or was not voluntary; unless by voluntary is meant, flowing from a mind free from the disturbing force of great and agitating apprehensions. They have therefore given some trouble to writers upon this branch of the law, who, misled by the use of the term *voluntary*, cling to the idea that such evidence is rejected, because it is obtained

by a species of compulsion, in violation of the rule that no one shall be bound to criminate himself. (*Joy on Con.* 67-8.)

But these cases are not only based upon the soundest reason and the purest justice, but are abundantly sustained by other authorities.

Owen's case (9 *Car. and Payne*, 238) was an indictment against the prisoners, Owen and two others, for murder; and upon the trial it was proposed, on the part of the prosecution, to give in evidence the deposition of the prisoner on oath on the coroner's inquest held on the body of the deceased.

After a very full discussion and citation of authorities, Baron GURNEY, who presided at the trial, excluded the evidence.

There can be no just pretence that in either of these cases, the persons examined were brought before the magistrate or coroner as prisoners charged with the crime. In England, warrants are issued for witnesses in criminal cases, and they are frequently brought before coroners and examining officers in custody.

Joy, in speaking of these cases, says: "It may be observed with respect to these cases, that at the time the depositions were taken, the prisoners were not under charge as prisoners of any crime. They were brought forward, though in custody, only as witnesses." (*Joy on Con.* 68.) This is clearly the inference from the cases themselves, and there can be no doubt of its truth, provided the parties were in custody at all in the two first cases, which does not expressly appear. The report in Lewis's case states that the prisoner was *summoned* before the magistrate.

But the affirmative of the question we are considering does not rest upon these three cases alone.

In Wheeley's case, (8 *Car. and Payne*, 250,) the prisoner was charged with murder. Upon trial the counsel for the prosecution offered in evidence a statement made by the prisoner before the coroner at the inquest. This statement purported to have been made on oath. Baron ALDERSON, who presided at the trial, rejected the evidence, saying: That he not only could not receive the evidence, but that he could not allow

parol evidence to be given to show that the statement was not made under oath.

It is true, that in Owen's case, (9 *Car. and Payne*, 88,) Godson, one of the counsel, referring to this case of Wheeley, says: That Baron ALDERSON rejected the deposition, "because it was on oath, and taken while he, Wheeley, was in custody." But it will be seen that Godson was then arguing that the deposition of Owen and his associates should be rejected because *they* were in custody, and he refers to Wheeley's case as a parallel case; this shows that Wheeley was in custody not as the accused party, but as a witness only, precisely as were Owen and his associates.

Besides, Baron ALDERSON himself takes no notice of the fact that Wheeley was in custody, and makes that no part of the ground of his decision. It is clear, therefore, that this case is to be added to the three previously cited, as involving the same principle.

There is an additional English case cited in a note to Haworth's case, (4 *Car. and Payne*, 254.) The note states, that "in a case tried at Worcester, where it appeared that a coroner's inquest had been held on the body, and it not being suspected that B. was at all concerned in the murder of A., the coroner had examined B. upon oath as a witness. PARK, J., would not allow the deposition of B., so taken on oath at the coroner's inquest, to be read in evidence on the trial of an indictment afterward found against B. for the same murder."

These five constitute the series of English cases going to sustain the affirmative of the question proposed. It is to be observed, however, that the last of these cases goes further than is necessary to sustain the objection taken to the evidence in this case, because, it is expressly stated that the prisoner at the time of his examination before the coroner *was not suspected* of being at all concerned in the murder.

I will refer to a single American case only, to wit; Broughton's case, (7 *Iredell*, 98.) In that case, although the testimony of the prisoner given before the grand jury upon an inquiry into the circumstances of the murder was admitted upon special

grounds, yet Chief Justice RUFFIN, in giving the opinion of the court, says, that "Lewis's case (6 *Car. and Payne*, 161) was properly decided."

I come now to the consideration of a class of cases which have been supposed to conflict with those previously cited, but which are, in truth, in perfect accordance with them.

The first to which I deem it necessary to refer is Merceron's case, (2 *Stark. R.* 266.) That was an indictment against the defendant for misconduct as a magistrate. Upon the trial it was proposed to prove on the part of the prosecution what had been said by the defendant, in the course of his examination before a committee of the House of Commons, appointed for the purpose of inquiring into the police of the metropolis. The defendant had been compelled to appear before a committee.

It was objected by the defendant that the examination having been made under compulsory process from the House of Commons, it was not voluntary, and therefore was not admissible. Justice ABBOTT admitted the evidence.

It seems that this same justice afterward, when Lord Tenterdon, in Rex agt. Gilham, (1 *Mood. C. C.* 208,) on Merceron's case being cited, said: "I think there must be some mistake in that case; the evidence must have been given without oath, and before a committee of inquiry, where the witness would not be bound to answer."

This remark shows that the learned judge was laboring at the moment under the delusive impression which the indiscriminate use of the word voluntary, to test the admissibility of evidence in such cases, has tended to produce.

The next is Haworth's case, (*Car. and Payne*, 254.) This was an indictment for forgery. On the trial the counsel for the prosecution called the clerk of the magistrate by whom the defendant had been examined, who stated, that "before the prisoner was either charged or suspected of having committed any offence," he was called as a witness against one Shearer, who was tried for forgery, and sworn to a deposition.

The deposition was offered in evidence and objected to, but admitted by Mr. Justice PARK.

Why was it stated in the report of this case, that the deposition was made not only before the prisoner was charged with, but before he was suspected of guilt? The idea which prompted this statement could have been no other than that for which I contend: that if he had testified under the mental agitation which would be produced by the apprehension of an immediate prosecution for crime, his statement could not be received.

But this idea is more distinctly brought out in the next, to wit: Tubby's case, (5 *Car. and Payne*, 580.) It was a trial for burglary. The counsel for the prosecution proposed to read a statement made upon oath by the prisoner at *a time when he was under no suspicion*. The evidence was objected to, but VAUGHAN, B., said: "I do not see any objection to its being read, as *no suspicion attached* to the party at the time. The question is—Is it the statement of the prisoner on oath? Clearly not; for he was not a prisoner at the time when he made it."

Now, although the learned judge puts his decision *in part* upon the ground that the party was not in custody when he made the statement, yet the first reason he gives is, that *no suspicion* then attached to him.

These cases, so far from conflicting with the cases of Lewis, and Davis, and Owen, tend, in my view, strongly to confirm them, from the countenance they give to the principle upon which those three cases rest; which is, that declarations made when the mind of the party making them is disturbed by the apprehension of a prosecution for crime, and under the constraint of an oath upon a judicial inquiry *as to the crime*, are not evidence against the party upon a subsequent trial for the same crime.

There are besides these, two cases, to wit: Owen's case, (9 *Carr. and Payne*, 83,) and Sandy's case, (1 *Carr. and Marsh*, 345,) in which the deposition of the prisoner on trial for murder, taken upon the inquisition before the coroner, and when the prisoner had not been charged with the crime, were received in evidence upon the trial; but in both cases the question was reserved for the opinion of the fifteen judges, and the prisoner having been acquitted in each case, the question *was never passed upon*.

Independently of the case of Wheeler, therefore, (2 C. C. 45,) there is no authority which conflicts with the cases which I have cited as going to sustain the objection taken in this case. As the case of Wheeler was brought before the fifteen judges, and as this is the case which has been treated as most in conflict with those of Lewis, Davis, &c., it deserves some consideration.

It was a trial for the forgery of an acceptance to a bill of exchange. The bill had passed through the hands of the prisoner's father, who had subsequently become bankrupt; and the prisoner was examined as a witness touching the bill in question, among others, before the Commissioners in Bankruptcy.

He was attended by counsel, and informed that he was at liberty to decline answering any question. Previous to his examination before the commissioners, he had been brought before the Lord Mayor, and charged with the forgery, but had been discharged for want of sufficient evidence to warrant his commitment.

His examination before the commissioners, which was upon oath, was offered in evidence against him upon the trial, and objected to, but received. The prisoner was convicted; and upon the question being brought before the judges, the conviction was sustained.

This is undoubtedly the strongest case to be found in favor of the reception of the sworn statements of a prisoner in evidence against him upon his trial for crime; but there are several things to be remarked concerning it. In the first place, the statement offered in evidence, was not made upon any judicial examination or inquiry respecting *the crime* for which the prisoner was on trial.

This is a marked feature, which distinguishes this case from every one of the five cases above cited, in which the statement on oath of the prisoner was rejected; as well as from the one at bar. The case of Wheeler was evidently considered as falling within the settled rule, that the previous declarations of a prisoner, although under oath, if made in a proceeding foreign to the crime with which he is charged, are competent evidence

against him upon the trial. The doubt in this case was really raised by the two circumstances, that the inquiry before the commissioners related in part to the same bill alleged to have been forged; and that the prisoner, when examined, was obviously resting under strong suspicion of the forgery. This, however, was not thought sufficient to take the case out of the ordinary rule.

That this was the view taken of the case is evident from the remarks made by several of the judges upon the argument. Baron PARK, addressing the counsel for the prisoner, says: "Here the commissioners had a right to examine the prisoner. Do you mean to say, that if a person, *on a trial between parties*, choose to make certain answers, they may not be used afterward against him? And LITLEDALE J., says: 'Suppose, in answer to a bill in equity, a party state facts which afterward are found to chime in with other facts, are they not admissible in evidence against him?' " The distinction between the class of cases to which the case of Wheater was treated by the judges as belonging, and to which it evidently did belong, and those where the evidence offered was obtained under the constraint of an oath, administered upon a judicial inquiry in regard to the very crime for which the prisoner is on trial, is obvious, and runs through all the cases.

The reason for the distinction between the examination of a party upon a direct inquiry as to the crime, with which he is afterward charged, and his testimony in another case, is well stated by Mr. Greenleaf in his work on evidence. (1 *Green. Ev.*, sec. 226.) After stating the decision in *Rex agt. Lewis*, before cited, he says:—"This case may seem at the first view to be at variance with what has just been stated as the general principle in regard to testimony given in another case; but the difference lies in the different natures of the two proceedings. In the former case the mind of the witness is not disturbed by a criminal charge; and, moreover, he is generally aided and protected by the presence of the counsel in the cause; but in the latter case, being a prisoner, subjected to an inquisitorial examination, and himself at least in danger of an accusation,

his mind is brought under the influence of those disturbing forces, against which it is the policy of the law to protect him."

Mr. Greenleaf makes no use of the word *voluntary* in illustrating this distinction.

To review for a moment our ground. It will be seen that there are three distinct classes of cases in which, upon the trial of persons for crime, their previous statements upon oath may be offered in evidence against them, viz. :

1. When the oath was administered, not upon any direct investigation as to the crime itself, but in some other suit or proceeding.

2. When it was administered by a magistrate engaged in a preliminary examination as to the crime ; and,

3. Where it was taken before a coroner's jury.

We shall be able to form a clear idea of the state of the authorities on the subject, by arranging them according to this classification. Of the cases cited, Merceron's case and Wheater's case belong to the first class ; and in both of these cases the evidence was received.

Lewis's case, Davis's case, and Haworth's case, belong to the second class. In the two first, the proof offered was rejected ; and in the last it was received, it being expressly stated in the case, that the statement was made "before the prisoner was either charged or suspected of any crime."

The other cases, viz. : Owen's two cases, Wheeley's case, Sandy's case, and the anonymous case stated in the note to Haworth's case, all belong to the third class. In three of these the evidence was rejected ; in the other two, to wit, Owen's first case, and Sandy's case, although it was received, the question was expressly reserved for the opinion of the fifteen judges, and never afterward passed upon.

The case of Broughton is *sui generis*, and has but little bearing upon the question, because it is put upon a distinct and peculiar ground, while it expressly recognizes the accuracy of the decision in Lewis's case.

This classification discloses the striking fact, that there has,
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so far as appears, never yet been a single reported decision in favor of the admissibility under any circumstances, upon a trial for murder, of the examination of the prisoner before a coroner's jury.

The two cases in which it was received reserving the question, have not the weight of decisions even at the assizes; because that is the only mode in which the opinion of the court in *banco* in England can be obtained. So far as authority goes, therefore, there are three decisions at the English assizes against, and not one any where in favor of its admissibility.

There is just reason for grouping examinations before a coroner's jury in a distinct class. The nature of the crime, the time of holding such inquisitions—immediately upon the death—the public excitement, and the circumstances usually attendant, are peculiarly calculated to produce that serious disturbance of the faculties, against which, in the language of Greenleaf, "it is the policy of the law to protect men." It ought not, therefore, to be matter of surprise that there is no decision in favor of the admissibility of such examinations in any case, even where it appears, as it did in the anonymous case decided by PARK, J., that no suspicion attached to the party when the examination was taken. I hold the decision in that case, and the one in Wheeley's case, to be right. But whether they can be sustained or not, there can, I think, be no doubt of the propriety of excluding the evidence, where the party, when testifying before the coroner's jury, is conscious that suspicion is resting upon him. It would be inadmissible under such circumstances, even when taken before the examining magistrate. This has been held in every case upon the subject. Haworth's case is no exception. *A fortiori*, then, it should be excluded when taken upon an inquest by the coroner.

It is only necessary to look at the question put to Hendrickson upon his examination, to see that he must have been fully aware that he was suspected. The repetition of the question as to the time when he was last in Albany, and the questions as to his having visited the drug store, could not fail to have

suggested to his mind the fact that suspicion was directed to him.

In view, therefore, of the reasoning and authorities here presented, I have no hesitation in coming to the conclusion, that the admission upon the trial of this case of the statements of the prisoner made on oath before the coroner's jury was erroneous, and that a new trial should be granted for that reason.

Although this conclusion is decisive of the case, it may be expedient to express briefly an opinion as to the admissibility of the will of Lawrence Van Deusen, as evidence to the jury. I have been unable to take any view of the case which would show this will to be relevant and pertinent evidence. Its relation to the issue, if any, is so remote, and its bearing so uncertain, that I cannot perceive that it could furnish a safe foundation for any inference whatever. In criminal, and especially capital cases, too much care can hardly be taken to guard the minds of the jury from the influence of testimony which can have the slightest tendency to mislead. As the testimony concerning the will was received by the judge, under objection, the jury would naturally seek to make some use of it, and to draw from it some inference bearing upon the issue to be determined.

I am, therefore, decidedly of opinion that this evidence was improperly received; and that for this reason, also, a new trial should be granted.

GARDNER, C. J., and ALLEN, J., concurred with Judge SELDEN in the opinion that a new trial should be granted, the former upon the second, and the latter upon the first ground discussed in the foregoing opinion.

NEW-YORK COMMON PLEAS.

BUCKMAN agt. CARNLEY, Sheriff.

Where the bail given for a defendant upon his arrest are excepted to and do not justify—and no other bail are given—nor a deposit made, the sheriff himself becomes liable as bail.

At any time before process against the person of the defendant is issued, the sheriff may discharge himself from such liability by the giving and justification of bail, but not after such process.

The putting in of such bail after such process, and an order exonerating such bail upon a surrender, held unnecessary and inoperative, except as a means of getting the original defendant into custody.

But the sheriff, although his liability *as bail* is fixed by such return of a *ca. sa.* “not found,” is only liable *as bail*, and he has the same right to relief within twenty days after action brought against him, as is given to bail by § 191 of the Code; and upon obtaining the lawful custody of the defendant, so that he may be held in execution of process against his person, he may be discharged from his liability.

Papers served in the name of a stranger—not an attorney of the court—not authenticated by a party or his attorney, or by the sheriff or any one professing to act in his behalf, are irregular, and cannot be made the basis of an order which shall affect the plaintiff’s proceeding.

Special Term, Feb., 1854. This is an action brought against the sheriff of the city and county of New-York to recover from him the amount of a judgment recovered by the plaintiff against one John L. Haines; and the present motion is made for a perpetual stay of the plaintiff’s proceedings, upon the ground that the liability of the sheriff has been discharged by an exoneretur obtained since this suit was commenced.

The following facts appeared by the affidavits read on the motion.

An order to arrest Haines, (defendant,) in the original action was made on the 15th January, 1850. On such arrest the sheriff took from him and two others, the usual undertaking by bail, pursuant to section 187 of the Code, a copy of which was served on Mather, plaintiff’s attorney, in *that* suit on the 30th of January.

Mather, then plaintiff’s attorney, gave notice of non-acceptance of the bail thus put in, on the 5th of February following,

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and proceeded to judgment in the original suit, issued a *fi. fa.* on the judgment, then a *ca. sa.*, which latter writ was returned by the sheriff "not found" on the 5th day of October thereafter.

On the 20th day of November the plaintiff, by White his attorney, commenced this action.

On the same day, but after this suit was commenced, a copy of a paper purporting to be an undertaking by Matthew H. Chase, deputy sheriff as bail, marked, "Filed Oct. 30, 1850," with certificate by the under sheriff annexed, certifying that John L. Haines is in the custody of the sheriff; and a notice signed by *Matthew H. Chase* that *he* would apply on the 30th of November, at 10 o'clock A. M., for an order exonerating *him*, as bail was served upon Mather, the plaintiff's original attorney.

Before the time mentioned in such notice, Mather served on the sheriff a notice that he had received such papers, stating that he did not understand what it meant; notifying the sheriff that he did not accept Chase as bail, if so intended, denying the regularity of the proceeding, and referring the sheriff to the *complaint* in *this* action.

An order was, nevertheless, made upon the same day, upon proof of the service of the above papers upon Mather, who did not appear to oppose, that "bail of the defendant" in the action be exonerated, which was also served on Mather the same day.

On the 11th of December following, for some reason which does not appear, an order was obtained and served on Mather, bearing the signature of a judge of the court, (but not authenticated or certified in any manner so as to show upon whose application, or at whose instance it was made,) requiring *him* to show cause why the *bail* of the defendant, in the original action, should not be exonerated. A copy of this order Mather sent to the sheriff on the 18th of December, stating that he did not know from whom it came, and inviting the sheriff to pay such attention to it as the sheriff might think proper to protect his own interests, or if the order itself was procured on

his (the sheriff's) behalf, denying its regularity and reiterating his former reference to this suit.

Notwithstanding such last-mentioned notice, upon a further certificate dated the 11th of December, signed by the under sheriff, stating that the defendant, Haines, was in custody by virtue of a commitment in *discharge of his bail*, and on proof of service of the last above-named order to show cause, no person appearing for the plaintiff, an order was, on the 16th of December, 1850, made by the judge *upon the back of the undertaking signed by Matthew H. Chase*, that "the bail of the defendant are discharged from all liability, as such bail in the suit in which the *within* undertaking was taken."

Thereupon, and on the 30th of December, 1850, the present order to show cause why proceedings in this action against the sheriff should not be perpetually stayed, was granted upon affidavits that the sheriff caused the undertaking by *Chase* to be put in and the various subsequent papers and proceedings above-named to be served and taken, and that he had tendered the plaintiff's attorney the costs in this action, and this order to show cause was served upon White, the plaintiff's attorney in this action, and was the first notice received by him of any steps taken in the matter since this suit was commenced, except that some person whom he did not know had on the 11th of December offered to pay him \$12,12 as the costs of this action, provided he would discontinue this suit.

JOHN H. WHITE, *for Plaintiff.*

FONDEY & LATHROP, *for Defendant.*

WOODRUFF, Judge. Chapter 1st of title 7 of the Code, after authorizing an arrest, specifying the requisites of bail, and their right to surrender their principal, and the manner of doing so, provides in § 201, that if the defendant, after being arrested, escape or be rescued, or if bail be not given or justified, or a deposit be not made, &c., the sheriff shall himself be liable as bail, and that he may discharge himself from such liability by giving and justifying bail at any time before process against the person of the defendant.

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In the present case the defendant was arrested, bail was not justified, and no deposit was made. The sheriff did, therefore, by the clear terms of the section, become liable as bail. He did not discharge himself by the giving and justification of bail before process against the person of the defendant was issued. His right to discharge himself by giving and justifying bail was gone, and his liability as bail thereby became fixed.

What was that liability, and could the sheriff be afterward exonerated?

This question will be answered by inquiring, what is the liability of bail, and how may bail be exonerated?

1st. Bail may be exonerated by a surrender of the defendant before a failure to comply with their undertaking, i. e., before the return of process against the person of the defendant. (Sections 188-9.)

Neither the sheriff nor other bail can avail themselves of this provision, according to its letter, after their liability is fixed by the issuing and return of such process, and if their liability become so fixed, they may be proceeded against by action. (§ 190.)

2d. By the death of the defendant, his imprisonment in the state prison, or his legal discharge from the obligation to render himself amenable to the process.

Neither of these circumstances have arisen in this case.

3d. By the defendant's surrender to the sheriff of the county where he was arrested in execution of the process against him, within twenty days after the commencement of the action against their bail, or within such further time as may be granted by the court. (§ 191.)

This provision contemplates the recovery of final judgment against the original defendant; the issuing of process against the person; the return of that process by means of which the liability of bail has become fixed; the commencement of suit against the bail upon that liability, and a surrender thereafter in their exoneration, within twenty days, or within such further time as the court may grant.

Under this latter provision, bail, though their liability as such has become fixed, may be exonerated by a surrender after

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action brought against them as above suggested ; the sheriff in a case like the present has become liable as bail, but only as bail—his liability is the same in extent—is to be enforced in the same manner, and may be discharged by the same means. To hold otherwise would not be to hold him liable as bail, but as under a liability more stringent than that of bail.

I have therefore no doubt that the sheriff may, after action brought against him, be exonerated by the surrender mentioned in the 191st section. It was, in my judgment, the intention of the legislature to place the sheriff, in case of escape or failure of bail to justify, &c., in the same situation in all respects as bail, if he do not before process issues against the person of the defendant, put in other bail who shall justify ; and when in that situation, he has the same right to an exoneretur after action brought against him, which, by the last-named section, is given to them.

The sheriff, in this case, caused other bail to be put in, and, upon their surrender of the defendant, obtained an order for the exoneration of the bail of the defendant. His right to put in other bail as between him and the plaintiff was gone, when process issued against the person of the defendant, (§ 201.) Not having previously put in and justified bail, he had then become bail himself ; the only exoneration which was required, and was proper or regular, was an exoneration from his liability as bail ; he could not as between himself and the plaintiff substitute another. The plaintiff was not bound to regard the other bail so put in. But this form of putting in other bail, and the surrender by them, has obviously been resorted to only as a means of bringing the defendant within the power of the sheriff, so that he might avail himself of the privilege given by the 191st section. Whether it was necessary for the sheriff to adopt that means, it is not material to inquire. Those means were successful, and the plaintiff has no concern with the inquiry how the sheriff was enabled to effect the surrender, provided it was done in such a manner as to leave the defendant in custody, and make him amenable to process under the judgment against him—this, I think, was done.

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But the attorney for the plaintiff, in the original action, was notified of an application to exonerate the bail for the defendant, and was served at the same time with an undertaking, signed by Matthew H. Chase. He had no reason to suppose that this application was made by the sheriff, or was for his exoneration. It was a matter of indifference to him whether Matthew H. Chase was exonerated or not—as between the plaintiff and the sheriff—the sheriff was bail, and notice ought to have been given that an application would be made to exonerate him. The papers served were not authenticated in any manner so as to apprise the plaintiff that the sheriff was seeking to obtain relief, and if it was proper to serve them upon the attorney for plaintiff in the original action, instead of his attorney in the present suit, I think they were not sufficient notice of any motion in the sheriff's behalf.

I would not encourage a total disregard of any notice of an application to the court, founded on mere irregularity. But here the plaintiff's attorney did not totally disregard it. He notified the sheriff that he had received such a notice—that he did not know from whom it came—that he deemed it irregular, and put the sheriff fully on his guard, and the sheriff ought, I think, to have thereupon distinctly apprised him of the purpose and design of the application, and on whose behalf it was made. Upon this ground I think the motion must be denied; but I am disposed to stay the plaintiff's proceedings and give time to the sheriff to procure an exoneretur, to which he is, I think, clearly entitled.

As the questions raised on this motion are novel, and the practice under this part of the Code, so far as I can discover, wholly unsettled, and by no means free from difficulty, I allow no costs.

SUPREME COURT.

YATES agt. BIGELOW.

The further account which section 156 permits to be called for, may be enforced by motion after all the pleadings are put in.

General Term, Cooperstown, July, 1858. On appeal from an order made at special term.

FERREY & BROWN, for Plaintiff.

A. BECKER, for Defendant.

By the Court—SHANKLAND, Justice. I am constrained to differ from the learned justice, who decided this cause at special term, on the question of practice involved in the motion. He holds, that the *further account* which § 158 permits to be called for, where the first is defective, cannot be called for, or the delivery of it enforced by motion, on the part of the plaintiff after he has replied to the answer. The decision proceeds on the hypothesis, that the account is a part of the pleading, and therefore, in fact, though not in terms, within rule 40 of this court, which rule applies to the allegations of a pleading so indefinite or uncertain, that the precise nature of the charge or defence is not apparent. That rule requires motions for relief under § 160, to be noticed, before demurring or answering the pleading, and within twenty days from the service thereof. Doubtless the account mentioned in § 158, when served, becomes a part of the complaint, or answer, so far as to limit the party's rights to give evidence of the items of the account thus served; but like the bill of particulars under the old practice, it may be called for at any time before the trial. (*Graham's Practice*, 512.)

Section 158 requires a party alleging an account in his pleading, to deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account, * * * or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a further account when the one delivered is defective; and the court may in all

cases order a bill of particulars of the claim of either party to be furnished.

The decision from which this appeal is taken, supposes the only object of obtaining the account mentioned in this section, is to enable the opposite party to put in the proper answer, or reply to it; and that by answering or replying, before calling for the *further account*, admits the account served to have been sufficiently certain, and that the further account is thereby waived. But I am of opinion that the main object of the account is to enable the party to see what items are claimed, and to prepare for trial, although in some cases it may be necessary for the other object. Indeed, the account may be called for when the party has either object in view, and need not assign any cause for the exercise of the right given to him, by the section, without condition or limitation. The first demand of a copy of the account may be made after all the pleadings are put in, and when it is no longer needed for that purpose, and if so, it follows that the *further account* may be had after that time also. The only question that can then arise will be, whether the account before delivered is defective.

If the justice at special term had deemed the account already delivered not defective, we would not have sustained this appeal. But the denial of the motion was not put on that ground, but expressly upon the ground that the party, by replying to the answer before calling for a further account, had precluded himself from relief. But mistaking an important question of practice, the plaintiff is denied a meritorious application, by the court, on the supposition that the rules of the court and of the Code denied the power of relief.

The rule to be entered should be, to reverse the order appealed from, with ten dollars costs, but no costs of the motion at special term to either party.

NEW-YORK COMMON PLEAS.

SARTOS agt. MERCEQUES.

Where a defendant is discharged from arrest on giving bail to the sheriff, and the bail subsequently fail to justify, the sheriff, by the 201st section of the Code, becomes liable *as bail*, and is entitled to the same rights and powers as the defendant's bail. He may, therefore, as bail arrest the defendant and surrender him in the action; and for this purpose no process is necessary. (*See Buckman agt. Carnley, ante page 180.*)

It is not within the province of the court to order a sheriff to take bail for the jail liberties, nor to pass upon the sufficiency of such bail.

Special Term, April, 1854. This action was to recover the possession of personal property. The defendant was arrested by the sheriff, and on giving the usual bail was discharged from arrest. The bail afterward failed to justify, and the sheriff rearrested the defendant. He now moved to be discharged from arrest, and if not, that the sheriff be directed to admit him to the liberties of the jail, on giving proper security.

for Plaintiff.

FERRIS & CONDERT, *for Defendant.*

INGRAHAM, First Judge. The defendant was arrested by the sheriff, under the third subdivision of section 179 of the Code. The action was for the recovery of personal property. Upon the arrest, the defendant gave bail to the sheriff, and was discharged by him; but on the failure of the bail to justify, the sheriff rearrested the defendant. He now moves to be *discharged from arrest*, and if that is denied, he moves for an order that the sheriff admit him, on giving bail, to the *liberties* of the jail. Under the former practice, the sheriff was liable if the sureties did not justify, in the same manner as in cases of arrest in personal actions, and his remedy was upon the bond taken by him. He had no power to arrest the defendant except by becoming bail, and then arresting him for the purpose of a surrender. By the 201st section of the Code, this liability of the sheriff is altered, and the sheriff is now made liable *as bail*; and by the next section a recovery against him on such liability

Santos agt. Merteques.

as bail may be collected by proceedings on his official bond. His liability, then, is the same as if he was one of the bail of the defendant, and I think he is entitled to the same rights and powers. As bail, he may arrest the defendant and surrender him in the action, and for that purpose no process is necessary. Other provisions are incorporated in the 201st section for the discharge of the sheriff's liability, by putting in other bail; but until that is done he remains liable as the defendant's bail, and has the same rights and powers. A case involving to some extent this question was heretofore decided in this court, to which I refer. Buckman agt. Carnley, *ante*, p. 180.

The other question is, whether the defendant is entitled to the liberties of the jail, after his arrest by the sheriff? Whether he is so or not cannot be of much moment on this motion, because it is not within the province of the court to order the sheriff to take bail for the jail liberties. If he unjustly refuses to take such bail, the sheriff is responsible to the injured party; or, if he seeks relief, it must be by another mode than by motion in the cause. The sheriff has a right to demand satisfactory security, and if at any time he thinks the security insufficient, he has a right to require other security. The court cannot pass upon the sufficiency of the bail for the jail liberties, nor in any way order the sheriff to accept the bond of any sureties for such a purpose. Not having the power to decide as to the sufficiency of the sureties, it follows that we have no right to order the sheriff in such a case to admit the defendant to the liberties of the jail. This motion must be denied, and as the questions are new, without costs.

NEW-YORK COMMON PLEAS.

TAYLOR AND OTHERS agt. CHURCH.

Whether an action of *libel* on a *firm* can be maintained at all, and if in such action one of the plaintiffs, also a firm, dies, whether the suit abates absolutely *Quere?*

By the death of one of the plaintiffs and one of the members of a firm, the right by the remaining members to continue the prosecution, if the right of action continues, remains unaffected.

No leave to continue, under § 121 of the Code, is necessary, because no one is to be substituted. A suggestion on the record is sufficient. Section 121 applies only in the case where a representative or successor of the deceased is to be substituted as a party.

Special Term, April, 1854. The plaintiffs, composing a firm at the West, brought an action against the defendant for a libel upon the firm. The cause was tried, and judgment rendered for the plaintiffs. On appeal to the court of appeals, a new trial was ordered.

Pending the appeal, Taylor, one of the plaintiffs, died; a suggestion of such death was entered on the record, and after the decision of the court of appeals, the plaintiffs noticed the cause for trial at the April term of this court. The defendant moved to strike the cause from the calendar on the ground that the surviving plaintiffs should have obtained leave to continue the action in the names of the surviving partners.

C. B. SMITH, *for Plaintiffs.*

CLEAVELAND, TITUS, & CHAPMAN, *for Defendant.*

INGRAHAM, First Judge. This action is brought for a libel on a firm in regard to their business. The plaintiffs recovered a judgment in this court, and while an appeal was pending to the court of appeals, John C. Taylor, one of the plaintiffs, died. A suggestion of the death was made upon the record, and the case was heard before that court. The judgment was afterward reversed, and a new trial ordered. The defendant now moves for an order to strike the cause from the calendar, because the plaintiffs have not obtained an order, under the 121st

section of the Code, allowing the action to be continued. The 121st section of the Code provides that no action shall abate by the death of a party, if the cause of action survive or continue, and in case of death of the party, the court, on motion, may allow it to be continued by his representative or successor. It cannot be expected that we should, on a motion of this kind, decide whether such a cause of action as this (libel on a firm) dies with the death of one of the members of the firm, and the consequent dissolution of the firm thereby. Upon the trial of the cause, the question was argued at great length whether the action could be maintained at all, and the court of appeals in ordering a new trial did not decide that point. Nor could we with propriety, on this motion, decide how far the plaintiff's right of recovery may be affected by the death of one of them. If the firm had a valid claim at any time, the dissolution of the firm would not destroy the claim, and the fact that one member of the firm is dead, does not deprive the other members of the right to apply all the claims belonging to the firm to its benefit.

Upon a careful examination of the 121st section, I can see nothing which conflicts with the practice adopted in this case, of making a suggestion on the record, and proceeding in the cause. This is not a case in which the action is to be continued either by the representatives or successors of the deceased party. The present plaintiffs were the plaintiffs originally. By the death of one of their number, their right to continue the prosecution, if the right of action continues, is unaffected. No leave is necessary, because no one is to be substituted in the place of the deceased. The only thing necessary is to inform the court why the name of Taylor is omitted as plaintiff. This has been done by suggestion, as provided by the *R. S. 2 vol. p. 386, sec. 1.*

The provisions in the Code apply rather to the case mentioned in the 2d and 3d sections of the same chapter in *R. S.*, and substitute a motion for the remedy therein provided by *Scire Facias*.

In *Williamson agt. Moore*, (5 *Sand. S. C. R.*, p. 647,) the

superior court adopted this view of the 121st section of the Code, as not applicable to a case where one of the plaintiffs dies, and the action may be continued by the surviving plaintiffs. That was an equity case, and the decision is only applicable to this, as showing that the 121st section of the Code has not the extensive signification which the defendant's counsel would give it.

In the case of the death of one member of a firm, the cause of action *continues*. In such case the death does not abate the action. Under the provisions of the Revised Statutes, as well as the first part of the 121st section of the Code, the cause of action does not go to the representatives or successors of the deceased, but remains or continues in the remaining plaintiffs, and there is no representative or successor to be made a party under the latter part of the 121st section. As it is only in the case of a representative or successor that a motion is proper under that section, it cannot apply to this case or affect the provisions of the Revised Statutes, which are directly applicable.

The motion to strike the cause from the calendar is denied, without costs.

SUPREME COURT.

BECK AND ANOTHER agt. STEPHANI, RYBACK, AND OTHERS.

Where a defendant is made a party by an *amended* instead of a *supplemental complaint*, the facts as to him occurring after the issuing of the original complaint, it ought to be treated as an *irregularity*, and not a *nullity*, where no substantial rights or interests of such defendant are affected; it being merely a matter of form in bringing him before the court.

And where such defendant *appears generally* in the cause, it is a *waiver* of such *irregularity*; as much so as it would have been if he had appeared generally, after service of a *defective summons*.

A person who owes a debt or has incurred a liability, and is unable to determine, without serious risk, to which of several adverse claimants it should be rendered, may, on application to the court, compel such adverse claimants to *interplead*, and relieve him from further responsibility. A mere *claim* is a ground of interpleader. (1 *Mad. Ch.* 142.)

But the plaintiff must show that he does not collude with any of the claimants; that the claims are what, under the old distinctions, were denominated *legal*—that privity should subsist between him and the defendants—that he is in possession, actually or constructively—that he does not claim any interest in the property in dispute, and that he can in no other way be protected from an oppressive or vexatious litigation in which he has no personal interest.

There is nothing in the Code which takes away the right to resort to this remedy. The remedy prescribed in the Code is merely concurrent.

New-York Special Term, March, 1854. P. A. Milberg, of Hamburg, Germany, consigned to the plaintiffs four different shipments of merchandize, with instructions to deliver the same to Jacob Ryback, one of the defendants, upon payment of the freight and expenses. Upon the arrival, in December last, of two of the consignments, by the ships Rastede and Donan, they delivered to Ryback the bills of lading for them, on receiving from him the amount which they demanded for those charges. Soon after this, the plaintiffs received notice from Milberg, and from other defendants in this action, that the latter claimed to be entitled to the goods embraced in the several consignments, and cautioning them not to part with the possession of the property and of the bills of lading to Ryback, on the ground that he had fraudulently obtained possession of it

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from them, being merchants and manufacturers in Vienna ; that he pretended to purchase the goods, with the design of never paying for them, and of causing them to be conveyed secretly to the United States ; and, to carry out such design, he caused the goods to be secretly removed from Vienna to Hamburg, and there shipped by Milberg, who was not then aware of the fraud, to New-York, whither Ryback himself soon after took passage.

On receiving this information, and before Ryback (with the exception of two cases, each containing a piano forte) obtained actual possession of the property out of the public store, where they then remained in the custody of the collector, the plaintiffs applied on the 30th of December last to one of the justices of this court for an injunction, which was granted, to restrain him and the other claimants from taking possession and disposing of the property, and for the appointment of a receiver ; praying, in their complaint, that the defendants may be required to interplead and settle their conflicting claims, and that they, the plaintiffs, may be absolved from all liability in the premises.

The plaintiffs allege in their complaint, that they have no interest in the goods, that they do not collude with the defendants or any of them, and that this action is commenced solely for their own protection.

They further allege that after the commencement of this action, and after service of the injunction on Ryback, he entered into a stipulation on which an order was duly entered, by which it was agreed that Mr. Charles H. Loosey, the Austrian consul, should be appointed receiver of all the goods comprised in the four shipments, with liberty to make sales and to return the proceeds, to await the further order of the court ; but that Ryback, in evasion of these proceedings, and in violation of the injunction, made a pretended sale to Stephani, since made a defendant by amendment, and fraudulently contrived with him to have the goods which were imported in the Rastede removed from the public store, and afterward placed in the store, No. 112 Liberty-street, after which they were delivered by Ryback to Corona and Sittenfelt, as commission merchants, for sale

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on his account. They also are made defendants by amendment, claiming, however, to be indifferent between the parties, and now holding the property subject to the order of this court.

On these facts, the plaintiffs now apply for an extension of the injunction and receivership, so as to embrace the proceeds of the goods that might have been sold, and the documentary evidences of title to all of the goods, for a receivership against Stephani, and an attachment against Ryback for a violation of the injunction.

The defendants, Ryback and Stephani, move severally for a dissolution of the injunction, with costs against the plaintiffs, upon affidavits denying many of the facts alleged by the plaintiffs in their original and amended complaint, and in their affidavits.

——— *for Plaintiffs.*

——— *for Defendants.*

CLERKE, Justice. The facts charged against Stephani in the amended complaint ought strictly to have been brought before the court by a supplemental complaint; because, according to the plaintiffs' own statement, they have occurred since the original complaint was presented; Hornfager agt. Hornfager, (6 *How. P. R.* 13; 1 *Barb. Ch.*, p. 207; 2 *id.* 63, 64;) and although Stephani alleges that these facts occurred prior to that time, yet, on this inquiry, we can only regard the statements in the complaint.

Is this defect, however, an irregularity or a nullity? If only the former, it cannot be regarded on this motion, being waived by the notice of appearance served on behalf of Stephani. A mere irregularity is very different from a nullity or an essential defect; which, with some exceptions, may be taken advantage of at a subsequent stage of the action, and is not necessarily waived, notwithstanding an inconsistent step by the party afterward objecting.

The whole tenor of recent legislation and of the practice of courts of justice indicates an unmistakeable inclination to treat deviations from proceedings prescribed by statutes or rules, as

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irregularities rather than nullities, provided the error is not calculated to produce any serious injury to the party whom it affects; and while he is allowed an ample opportunity for insisting that the mistake should be rectified before he can be compelled to proceed in the action, if he permits the opportunity to escape, it is to be presumed that he did not deem any notice of it essential to his interests.

I think the amendment of the original complaint, instead of a supplemental one, ought to be considered an irregularity and not a nullity. It is a mere technical objection, affecting rather the relative congruity of the proceedings than the substantial rights and interests of the defendant Stephani; in no possible respect can it be important to him, whether he was brought into this controversy by an amendment instead of by a supplemental complaint.

If, then, this is a mere irregularity, has not his appearance waived all right on his part to object to it? A notice of appearance waives all defects in the summons; it is an admission on the part of the defendant that he is regularly in court; and, whether he appears in obedience to a summons abounding in defects, or without a summons at all, he is before us, to all intents and purposes, as a defendant in the action.

I shall next consider whether this is a proper case to support an action demanding parties to interplead.

Instances are continually occurring, especially in a commercial community, where, from peculiar and unforeseen circumstances, a person who owes a debt, or has incurred a liability, is unable to determine, without serious risk, to which of several adverse claimants it should be rendered; and, to prevent the probable, or even possible injustice or vexation, arising from the prosecution of actions by any or all the claimants, this court will compel them to test their claims by judicial investigation in an action between themselves; in other words, the court will compel them to interplead, on the application of the person owing the duty or liability, and will relieve him from further responsibility. A mere claim is a ground of interpleader. (1 *Maddock's Ch.* 142.) The plaintiff, however,

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must show that he does not collude with any of the claimants, that the claims are what, under the old distinctions, were denominated *legal*, that privity should subsist between him and the defendants, that he is in possession, actually or constructively, that he does not claim any interest in the property in dispute, and that he can in no other way be protected from an oppressive or vexatious litigation, in which he has no personal interest. It matters not in what capacity the plaintiff has incurred the debt or liability, whether as a stakeholder, or tenant, or an ordinary agent, or as a public officer, or as an accidental recipient of the property. ✓ He has a right to claim the equitable intervention of the court for his complete indemnification and relief. To be sure, it is said that courts do not look very favorably upon this proceeding; and Lord HARDWICKE is reported to have expressed himself unwilling to allow *new inventions* in the bringing of such remedies. Metcalf agt. Harvey, (1 *Vesey*, 249.) But a mode of relief which can be in so many instances advantageously resorted to, will never be denied, where the plaintiff can present a state of facts of the description to which I have adverted.

And this, I think, the plaintiffs have very satisfactorily done in the present case. I can discover nothing to debar them from insisting, that those adverse defendants should interplead, and relieve them from any litigation which the defendants, or any of them, may think proper to institute. Neither is there anything in the Code, which takes away the right to resort to this remedy. The section of the Code referred to by the respective counsel of Ryback and Stephani, provides for cases where an action has been already commenced by one of several adverse claimants against a party in the situation of these plaintiffs. Persons, so situated, are still allowed, at all events where no action has as yet been commenced against them, to have recourse to this proceeding. The remedy prescribed in the Code is merely concurrent.

Having settled these points, it is not necessary for me to dwell upon the merits disclosed in these applications. There is a very sharp combat of affidavits, not unusual, I grieve to

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say, on such occasions. They are utterly discrepant and irreconcilable; and this is reason enough for requiring the contestants to interplead, in order to have their rival claims adjusted according to the ordinary course and practice of judicial proceedings. It is fit, then, that the property in question should be retained in the custody of the receiver, to await safely the final adjudication of the court.

I am of opinion, that the plaintiffs are entitled to all the relief they ask, and that the applications made by Ryback and Stephani to dissolve the injunction should be denied, without costs.

SUPREME COURT.

VAN NAMEE agt. PEOPLE.

By the 142d section of the Code it is required that the *title* of the cause shall be stated in the complaint. This title is composed of—the name of the court—the place of trial—and the names of the parties. Where the “name of the court” was omitted in the complaint, it was *held*, that the defendant was not prejudiced, it appearing that it was specified in the *summons*.

Where the plaintiff, by several allegations mingled together in one statement in his complaint, claimed to recover the amount of *three* promissory notes, *held*—that each note contained in itself a complete cause of action; consequently, several causes of action were improperly united. But the objection must be taken by *demurrer*—not by motion to set aside the complaint.

So, also, the objection that such causes of action are not “plainly numbered,” can only be taken advantage of by demurrer; because they are not so separated that a demurrer will not lie.

Ulster Special Term, Nov., 1858. Motion to set aside complaint for irregularity. The action was commenced by the service of a summons and complaint. The summons was entitled in the supreme court, but in the complaint the name of the court was omitted. The complaint sets forth three promissory notes, of different dates and amounts, made by the defendant, and payable to the order of the plaintiff. It then alleges that the notes had become due and that they remained unpaid, and

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claims judgment for the amount of the three notes, principal and interest.

The defendant moved to set aside the complaint upon the grounds,

1. That the title of the cause, as set forth in the complaint, did not specify the name of the court in which the action was brought.

2. That the complaint contained more than one distinct cause of action, and that the causes of action were not separately stated.

3. That the causes of action were not numbered, as required by the 87th rule.

THOMAS SMITH, *for Plaintiff.*

M. SCHOONMAKER, *for Defendant.*

HARRIS, Justice. It is required by the first subdivision of the 142d section of the Code, that the title of the cause shall be stated in the complaint. This title is composed of three ingredients; the name of the court, the place of trial, and the names of the parties. It is obvious that this complaint is defective in the first particular. The court in which the action is brought is not specified. But it is equally obvious that the defendant could not be misled, or in any way prejudiced by the omission. The name of the court was specified in the summons, and endorsed on the back of the complaint. Upon the trial, the court must be furnished with a copy of the summons, as well as the pleadings, and the summons, as well as the complaint, is to be inserted in the judgment roll. (*Code*, §§ 259, 281.) The record, therefore, would always show in what court the action had been prosecuted. No substantial right of the defendant can be affected by the defect, and, in such a case, the court is required by the 176th section of the Code to disregard it. See *Yates agt. Blodgett*, (8 *How.* 278.) It may well be, that where, as in *Ward agt. Stringham*, (1 *Code R.* 118,) no court is named either in the summons or the complaint, it should be held, as it was held in that case, that no suit had been commenced in any court. But that case is clearly distin-

guishable from this. Here, the defendant was apprised, by the process served upon him, in what court he was sued. He served a notice of retainer, entitled in that court. He comes to that court with his application to set aside the complaint, thus admitting that the action is pending there. Under these circumstances, the objection that the court is not named in the title of the complaint ought not to prevail.

The complaint contains three distinct causes of action. The plaintiff claims to recover the amount of three promissory notes. Each note, of course, contains in itself a complete cause of action. Under the former practice it must have been stated in a separate count. The plaintiff has mingled these three causes of action together, as though they constituted but a single cause of action. This would have furnished a good ground of demurrer. See *Getty agt. The Hudson River Railroad Co.*, (8 *How.* 177.) But it did not justify a motion to set aside the complaint. Though demurrable, for the reason that several causes of action are improperly united, the objection would be waived, if not taken by demurrer. See *Code*, § 148. The remark of Mr. Justice SELDEN, in *Benedict agt. Seymour*, (6 *How.* 298,) that if a plaintiff fails properly to distinguish between several causes of action united in the same complaint, every allegation which is not essential to a single cause of action may be stricken out, as redundant, cannot, I think, be sustained. Such allegations cannot be regarded as *redundant*, in any proper sense of the term. In the case now in hand, the allegation of the making and delivery of either one of the notes is as material as the making and delivery of the others. The mode in which the allegations are made is objectionable; but if the objection be not taken in the manner prescribed by the Code, it is waived, and the plaintiff must prevail upon each cause of action contained in his complaint, unless successfully defended upon the merits. The motion, therefore, cannot prevail upon the ground that the several causes of action stated in the complaint are not properly separated.

Nor is the remaining ground upon which the defendant relies available upon this motion. The 87th rule of this court, in ad-

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dition to the requirement of the 167th section of the Code, that causes of action, when united, should be separately stated, requires that such causes of action shall be "*plainly numbered.*" The mode of enforcing this requirement is not prescribed; but, assuming that it may properly be done by a motion to strike out, or set aside the pleading, as irregular, such motion can only be made in a case where the pleader has so separated his causes of action that a demurrer would not lie. This is not such a case. The complaint in fact contains several causes of action; but they are stated as though they, together, constituted but a single cause of action.

The objection must be taken by demurrer, or it will be deemed to have been waived. The 87th rule has no application to such a case. The motion must, therefore, be denied; but I think it should be without costs, and that the plaintiff should be at liberty to amend his complaint.

SUPREME COURT.

**YORKS agt. PECK AND OTHERS, Administrators, &c., AND
LAMPHIRE.**

Where, in an action upon a promissory note, brought against the representatives of a deceased *joint debtor*, upon the insolvency of the survivor, in which the surviving joint debtor was made a co-defendant, and a recovery had in favor of the plaintiff—*held*, that under *sec. 304, sub. 4* of the Code, the plaintiff was entitled to recover his *costs*.

The 41st section of the Revised Statutes (2 R. S. 90) has no application to such an action.

Livingston Circuit and Special Term, Oct., 1858. Motion that plaintiff recover costs and have leave to insert them in the judgment roll, and for an extra allowance, &c.

E. G. LAPHAM, for Plaintiff.

H. O. CHESEBRO, for Defendants.

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WELLES, Justice. Affidavits have been read in support of this motion, with a view of showing that under the provisions of sec. 41, 2 R. S. 90, (4 ed. 275, sec. 46,) the plaintiff is entitled to recover costs. Counter affidavits have also been read with a view of showing that under that section he is not entitled to costs. The affidavits are quite conflicting, but perhaps not so much so as not to be reconcilable on the score of misunderstanding or misrecollection. In the view, however, which I have taken of the subject, it becomes unnecessary to attempt such reconciliation.

The action was analagous to a suit in equity in the late court of chancery against the representatives of a deceased joint debtor upon the insolvency of the survivor, in which the surviving joint debtor is made a co-defendant with the representatives of his co-debtor, which could properly be done in a suit in equity. It was brought to recover the amount of a note, joint in its terms, made by Amon Lamphire and Reynold Peck, the intestate, to J. M. Wheeler, or order, at the Ontario Bank, for \$750, and interest six months after date, and dated August 1st, 1849. The note was endorsed by Wheeler to the plaintiff after it became due.

It was well settled that no action at law could be maintained against the representatives of the deceased, in such case, nor a suit in equity, without showing that the surviving joint debtor was insolvent, or that the creditor's remedy at law against him had been exhausted. Upon alleging and proving that an action at law would be ineffectual, for one of those reasons, a suit in equity to recover the debt was maintainable. It was upon that theory that this action was commenced.

Payment was refused, and the action defended by the administrators of Peck, under the impression that their intestate executed the note as surety for Lamphire, and for his accommodation only, in which case, the plaintiff would have had no remedy whatever, either at law or in equity, against the representatives of Peck. The defence, however, failed, and the plaintiff has recovered judgment at special term upon the note, against both Lamphire and the administrators of Peck, which

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has been affirmed by the general term, on appeal. (14 Barb. S. C. R. 644.)

The section of the Revised Statutes referred to has no application to such a case as the present. The section commences as follows: "In such suit no costs shall be recovered against the defendants; nor shall any costs be recovered in any suit *at law* against any executors or administrators, to be levied of their property, or of the property of the deceased, unless," &c. The suits first mentioned in the section ("such suits") are where there has been a reference as provided in the preceding sections, and it will be seen that the whole section relates to them, and to suits at law. This action does not belong to either class, but is an equitable action which has never been referred. Besides, I incline to think it is not a case referable under § 86, (§ 41 of 4th ed.,) which section was intended, as I think, to apply to legal claims only. Section 817 of the Code provides that in an action prosecuted or defended by an executor, administrator, &c., costs shall be recovered as in an action by and against a person prosecuting in his own right, such costs to be only chargeable upon or collected of the estate, &c., represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defence. The section then excepts from its application the cases provided for by § 41, before referred to, (2 R. S. 90,) and it has been shown that this is not one of those cases. It seems to me, therefore, to follow inevitably by force of § 804, sub. 4 of the Code, that the plaintiff is entitled to recover his costs. The question was regularly and properly one for the court before which the action was tried to have settled, or rather, a case where that court should have given judgment for costs; but it was reserved, and the parties have, by stipulation of their attorneys, waived all question on that account. I shall, therefore, grant the motion, and direct an extra allowance, under § 808 of the Code, of five per cent. on the amount recovered.



NEW-YORK COMMON PLEAS.

**DOWNING, Survivor, &c., Appellant, agt. MANN AND OTHERS,
Respondents.**

In an action against two or more defendants upon a contract made by, or in behalf of a firm or association, if one of the defendants makes default and others appear and deny their liability, it is sufficient, on the trial, for the plaintiff to prove that the contract was made by the firm or association, and that the defendants who appeared are members thereof; and it is not necessary for the plaintiff to prove that the defaulting defendant is also a member.

General Term, April, 1854. The material facts out of which this case arose are as follows: The action was to recover for the price of a supper provided by the plaintiff at the request of the defendants, for the "Morgan & Webb Association," of which the defendants were alleged to be members. Some of the defendants, among whom was one named Martin, suffered judgment to be entered against them by default. On the trial, the jury found a verdict for the plaintiff. Afterward, one of the defendants, (Levy,) applied for and obtained a new trial. On the second trial, the defendant, Levy, moved for a non-suit on the ground that the plaintiff had not proved a joint liability of *all* the defendants. The presiding judge, DALY, refused the non-suit, and instructed the jury that if the plaintiff had proved a joint liability of all the defendants, they should find for him, otherwise not. The jury found for the plaintiff. The defendant, Levy, then applied for, and obtained an order at special term for a third trial. This order was predicated on the assumption that as to the defendant, Martin, who had suffered judgment by default, there was no evidence to show him jointly liable with the other defendants, and that the plaintiff was bound to prove a joint liability of *all* the defendants, or fail; and that the motion for a non-suit was improperly refused. From this order the plaintiff appealed to the general term.

**H. KETCHUM, TOWNSHEND, & DIOSY, for Plaintiff.
MR. MORRISON, for Defendants.**

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WOODRUFF, Judge. In this case, the jury have found that the defendants jointly undertook to pay the plaintiff for the supper provided by him for the "Morgan and Webb Association," or that they authorized or sanctioned a contract on their behalf to that effect.

A motion for a non-suit was made on the trial, and as no special ground was assigned, it must be deemed to have been urged upon the general objection that the plaintiff had not made out a *prima facie* case. The motion being denied, the jury under a charge which seems to have been satisfactory to all parties, (and which we must therefore assume contained all proper directions respecting the law governing the liability of the defendants as joint contractors,) have found that the defendants did jointly contract with the plaintiff.

The defendant, Levy, moved for a new trial; and it is from the order granting a new trial that the plaintiff appeals. The motion for a new trial is not properly a renewal of the motion for a non-suit. The right to move for a non-suit never exists after verdict, except when *leave is expressly reserved* on the trial to renew the motion without being prejudiced by the verdict. Giving leave at the trial to move for a non-suit, notwithstanding any verdict which may be rendered, is not unusual in the English practice, and I have known it done in this state. Taking a verdict subject to the opinion of the court upon the law is here a more common practice. But where the proceedings are of an adversary character throughout, and the question is one of fact, the verdict of the jury on the facts disposes of the motion for a non-suit *as such*, and there being no violation of any rule of law, the only question remaining is this, is the verdict so far against the weight of the evidence, or so entirely unsupported by evidence, that it ought to be set aside by the court *upon that ground*? The counsel for the defendants raises one question in regard to the admissibility of evidence, but with that exception, the single inquiry is, have the jury found that the defendants are joint contractors upon evidence wholly insufficient to charge them as such under the rules of law which apply to that subject? It appears by the evidence of G. W. Dur-

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yea, that he obtained the names of a number of persons as a committee of arrangements for getting up a ball, and issued a circular under the name of "The Morgan and Webb Association," containing the names of the assumed members. The names of all the defendants were upon that circular, and all were placed there by their express permission except that of the defendant Levy.

With this circular the witness, Duryea, went to the plaintiff, and for, and on behalf of the "Morgan and Webb Association," contracted for the supper and gave him the circular containing the names of the associates. So far, nothing appeared to charge the defendant Levy; but evidence was further given by the plaintiffs that after the order for the supper was given, on being shown the circular with his name thereon as one of the association, and the agreement made by Duryea in behalf of the rest, he distinctly affirmed the contract, and directed the plaintiff to go on and get up the supper, &c.

No doubt there was in what transpired at the trial some, and it seems too great, reason to doubt the evidence of such affirmance; but the jury were the proper judges of the credibility of the witnesses: and as to Levy there can be no doubt the verdict should stand, if no rule of law was violated to his prejudice.

It is argued that as this affirmance by Levy was after the contract was made by Duryea, it is to be regarded as a separate promise, and not a promise made jointly with the other defendants. If this argument were well founded, I should hesitate long before I would set aside a verdict, otherwise correct, on the ground that the two or more promisors promised severally and not jointly, where their liability, as among themselves, was not altered by the form of the recovery, especially under a system where *several promisors* can be proceeded against in one action, and a joint judgment recovered, as well as where they promise jointly. Under such a system of practice and pleading, that objection would not rest simply on the ground of variance—such a variance might be either disregarded or amended.

But there is no just foundation for the argument. Duryea had

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put Levy's name on the circular without having seen *him*; but "by permission of Baker and Coutant." It is important to know whether (although Duryea had not seen him) they did not direct it with *his* assent; and when the plaintiff showed him the circular and the agreement, he expressly sanctions the use that had been made of his name, and affirms the agreement. It is not true that he, Levy, made a new agreement; he made no separate agreement under the statute of frauds or otherwise, to pay or to be liable for the debt of other persons. The jury (if they believed the plaintiff's witnesses) were warranted in finding, by just inference from what Levy said to the plaintiff, that Baker and Coutant had authority from him to put his name on the circular, and that he sanctioned it, and also that he recognized the act of Duryea in ordering the supper, as within the scope of his authority.

So far, then, as the defendant Levy is concerned, the verdict was not so against evidence or without evidence that we can disturb it on that ground.

As respects the other defendants, *except Martin*, the case stands thus, they had associated for the purpose of giving a ball, a committee of arrangements, on their behalf, order a supper—a common, though not a universal accompaniment of such a ball. The ball was held, the supper furnished, and the defendants attended, in pursuance of the original design. The manner in which Duryea testifies the affair was gotten up, shows, I think, that the details were left to his discretion. He obtained their assent to act as a committee of arrangements to get up a ball for pleasure, and "do other things usual for a ball," and they attended, and by their presence and concurrence approved what he had done, or, at least, placed themselves in a situation that the jury might reasonably infer their sanction.

The defendant Levy, however, insists that the judge on the trial erred in excluding evidence that Levy expressed to the committee his unwillingness to act as a member of the committee.

There was in this no error; what he may have said to the

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committee could not affect the plaintiff *after* what had passed between him and Levy, and if the communication was *before* his *interview* with the plaintiff, then it could not affect his liability, because he then sanctioned the use which had been made of his name.

But there is another reason why the ruling was correct. It was not claimed nor had the plaintiff given any evidence that Levy was on the *committee*. Duryea says distinctly, that he was *not*. The agreement was not made by Duryea on behalf of the *committee* only; but the "Morgan and Webb Association," whose names appeared on the circular left by him with the plaintiff, and among them that of Levy. It was, therefore, quite immaterial whether Levy was a *committee-man* or not, or whether he refused to act as a *member* of the *committee* or not. The question before the jury was, whether the evidence showed that Levy was a member of the *association* in whose name the supper was ordered, and whose names appeared upon the circular.

I have deemed it proper to review the case as exhibited upon the trial as against the defendants who appeared and defended in this respect, following the course pursued by counsel on the argument, for the purpose of seeing whether any of the defendants, other than *Martin*, who suffered judgment by default, have any grounds upon the merits, or upon the law governing their *respective* liability to the plaintiff, to ask a new trial; and my conclusion is, that they have none.

That although circumstances transpired at the trial warranting a suspicion that perjury was committed by one of the plaintiff's witnesses, and some apprehension of misconduct on the part of the defendant, yet there is no ground upon which we can properly interfere with the verdict, unless it be upon what is as to them a purely technical objection, viz.: *that Martin ought not to have been made a defendant.*

This objection is strenuously insisted upon by the counsel for the defendant Levy, and it would seem to have been deemed an important, if not the decisive reason, at the special term, for granting a new trial.

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The objection is stated thus, although the defendant Martin suffered a default, the plaintiff was nevertheless bound to prove not only that Levy and the other defendants became bound to the plaintiff for the supper in question, but that they became bound *jointly* with *Martin* therefor, and, therefore, that the plaintiff having failed to prove on the trial that Martin became jointly with them responsible for the supper, must fail in his action, although he may have shown to the satisfaction of the jury that all of the defendants who appeared and defended are liable.

In respect to the proof of Martin's liability, I am inclined to concur with the opinion of the judge by whom the order appealed from was made, viz. : that it was not sufficient, and yet not entirely without hesitation. The manner in which he lent his name to the defendant, Duryea, who acted for the others in the matter, carries with it a presumption that he designed to authorize him to use it for the purposes of the ball; nevertheless, as Martin is not shown to have done anything more, or to have known what was done by the others, nor by attendance, or otherwise, to have sanctioned it, he could not, I think, if his liability depended upon the proofs given on the trial, be held liable for the *supper* of which he is not shown to have had any knowledge. But by his default he has admitted his own liability, and it is conceded that he asks no relief. It is his co-defendants that now object to being included with him in the judgment.

Conceding the correctness of the principle that the plaintiff, notwithstanding the default of Martin, was bound to show a joint liability as against the defendants who did appear, I cannot forbear the observation, that we have made small advance in the promotion of simple and speedy justice by dispensing with technicalities and aiming at the substantial merits of a controversy, if we are compelled to send these parties back to another long and expensive trial to correct this error.

Notwithstanding this suggestion, I have no doubt of the correctness of the rule, and if when rightly understood and applied to this case, it appears that the plaintiff failed to es-

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tablish such joint liability, the order must be affirmed, and a new trial be had.

It may be true that the 173d section of the Code gives the court power to correct the error by striking out the name of the party who appears to have been improperly joined, and conforming the allegations to the facts proved in this respect, and that this would not conflict with cases cited to show that under § 274 there cannot be judgment for a plaintiff against one of two defendants alleged to be jointly liable, because an allowance of an amendment would obviate that very difficulty; but such a power should be exercised with great caution, and for reasons forcibly stated by Justice ALLEN in Fullerton agt. Taylor (6 How. P. R. 261.) It should, if at all, be exercised upon such terms as would certainly and abundantly protect the rights of the defendants, and if there is the slightest reason to suspect that the verdict was obtained by any unfair means, (although the evidence on that subject be not such as would warrant our setting it aside for that cause,) we would make a new trial the condition upon which an amendment was allowed.

But I apprehend that it is an entire mistake to suppose that the rule referred to reaches this case. I concede that where a plaintiff declares against two or more defendants upon a joint contract, and one of them denies such joint contract, the plaintiff must establish such joint contract or fail, and although the other defendant makes default, and so admits his own liability upon the contract as alleged, the plaintiff must, nevertheless, *as against the defendant who appears*, prove that he is a party to the joint contract. But this is the whole extent of the rule, and this is all that can be inferred from the cases to which we are referred. (See Elliott agt. Morgan, 7 Carr. and Payn, 884; Robertson agt. Granderton, vol. 9, ib. 476.)

It is not enough for the plaintiff to show on the trial a several contract by the defendant who appears; this would be a variance from the plaintiff's declaration or complaint.

But where the contract is made by or on the behalf of a *firm* or an *association*, and the liability of the firm or association is proved, it is enough for the plaintiff to show that the persons

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who appear and defend are members of such firm or association, and so are *jointly* liable with the other defendants whose membership is admitted, the joint contract is made out by such proof, so far as the defendants who appear are concerned.

Upon such proof, the case as against the defendants who appear, stands thus: An association or firm are liable for the debt. The defaulting defendants are members, and jointly liable, by their own admission, with all others who are shown to be members.

The plaintiff proves, as against the defendants who appear, that they also are members, and, if so, that they are jointly liable.

The case of Halladay agt. McDougall, (22 *Wend.* 264,) shows the true limitation of the rule above referred to, viz., that although one of the defendants makes a default, it will not be sufficient for the plaintiff to prove on the trial a several liability of the defendant who appears, but it is enough for the plaintiff, *assuming that the defaulting defendant is according to his own admission jointly liable*, to show that the other defendants are jointly liable with him. It was therefore held, in that case, that in an action against three defendants sought to be charged as partners, where only one is brought into court, and the others are returned not found, it is sufficient to entitle the plaintiff to recover, that he show that the *defendant brought in is a member of the firm* upon whose contract the action is founded, and it is not necessary in such case to prove that the other defendants were members of the firm. Where some of the defendants, though served, admit by their default their joint liability, the case is still stronger, and so the rule is stated in this latter case by the chancellor in his opinion, and see the cases therein cited.

This view of the subject seems to me conclusive on this appeal. The defendant, Levy, is liable, if at all, as a member of the "Morgan and Webb Association," and the jury have found him liable as such member. That association was liable for the supper in question, and as to the defendants appearing, it was, as settled in the case last cited, enough to show their

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membership without proving that Martin (who had admitted the fact as far as he was concerned) was also a member with them.

If there is anything in the pleadings of the case which renders this view of it inappropriate, they not having been made a part of the case herein, nor submitted to the court on the argument, I am not able to discover it, and I assume that if there was, counsel would have brought it to our notice. My conclusion is, that the order appealed from must be reversed, and a new trial denied, with costs.

SUPREME COURT.

LUCE agt. TREMPERT, URBAN AND WIFE.

Where defendant's attorney served notice of retainer and demand of copy complaint at two several times, (for several defendants,) upon plaintiff's attorney; and after twenty days had elapsed from the first service, but not twenty days from the last, he moved to dismiss the complaint for want of service—*held*, that on proof of service of the first notice and demand, the defendant was entitled to move, without waiting for the expiration of twenty days from the last service.

In ordinary cases, the practice, as settled, allows twenty days for service of copy complaint, after demand.

Erie Special Term, Dec. 1850. Motion by defendants to dismiss the complaint on the ground that the attorney for plaintiff did not deliver copy complaint to defendants' attorney, as demanded.

The summons was dated October 25, 1850, and was personally served on Trempert and Mrs. Urban, Nov. 8, 1850. The defendants' attorney served notice of retainer for Trempert and Mrs. Urban, and demanded copy complaint, Nov. 1, 1850. And on the 9th Nov., defendants' attorney served another notice of retainer and demand of copy complaint for all the defendants, which plaintiff's attorney neglected to serve. On the

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21st Nov. defendants' attorney served notice of motion to dismiss the complaint, for the reason that the plaintiff's attorney did not serve his complaint as demanded. The moving papers showed that only twelve days had elapsed between the date of the last demand of copy complaint, and service of notice of the motion.

J. D. GROS, *for Motion.*

JOHN GANSON, *Opposed.*

SILL, Justice. Granted the motion, with \$10 costs. And after the defendants' counsel had left court, the plaintiff's counsel called the attention of the court to the fact that there was not *twenty* days between the last demand of complaint and service of notice of motion; the judge thereupon directed the clerk not to enter the rule, and to give notice to defendants' counsel to come into court again, and on his appearing, the judge remarked, that there had been a mistake made in granting the motion, for the reason that twenty days had not intervened between the date of demand of complaint and service of notice of motion. Defendants' counsel remarked that such was not the fact, although the moving papers did not show it, and he thereupon produced the admission of plaintiff's attorneys, of service of notice of retainer, dated Nov. 1, 1850, which showed that twenty days had elapsed. And also cited 4 *How. Pr. R.* 306, Littlefield agt. Murin, in which it was required that the complaint should be served within a *reasonable time*, and that twenty-four hours would ordinarily be sufficient. The judge then said, that although the moving papers did not show that twenty days had elapsed, yet that the admission of service of plaintiff's attorney, dated Nov. 1, 1850, did show that the defendants' attorney was entitled to move at any rate, and he would not therefore disturb the decision first made. And remarked, that after the twenty-four hour rule had appeared, he dissented from the decision, and then held a correspondence with Justice ALLEN upon the subject; and it was agreed that thereafter, in all cases, they should hold that twenty days must be the time allowed to plaintiffs to serve complaint after demand.

SUPREME COURT.

FLYNN agt. CRONIKEN AND OTHERS.

Where the testator, in the first provision in his will, directed his executors to pay his debts and funeral expenses, but made no mention of legacies, and then gave to his wife a specific legacy of \$450, together with the unexpired lease of the premises which he then occupied, and all the household furniture and personal property within the dwelling house situated on the premises, excepting money and choses in action, and declared that such bequest should be in lieu of dower; after this, devised and bequeathed all the rest and residue of his estate, both real and personal, of which he might die seized or possessed, to his mother—*held*, that the legacy of \$450 to his wife was a charge on the real estate, there not being sufficient personal property.

New-York Special Term, Feb. 1853. On demurrer.

CHAS. H. SMITH, *for Plaintiff.*

T. JAMES GLOVER, *for Defendants.*

EDWARDS, Justice. By the first provision of the will, the testator directs his executors to pay his debts and funeral expenses, but he makes no mention of legacies. He then gives to his wife a specific legacy of \$450, together with the unexpired lease of the premises which he then occupied, and all the household furniture and personal property within the dwelling-house, situated on the premises, excepting money and choses in action, and declares that such bequest and provision shall be in lieu of dower. After this he gives, devises, and bequeaths, all the rest and residue of his estate, both real and personal, of which he may die seized or possessed, to his mother.

The personal estate was not sufficient for the payment of the legacy of \$450, and the question which is now presented is, whether it is a charge upon the real estate. It seems to me, that the provisions of the will, especially when taken in connection with the situation of the testator's property, render it sufficiently apparent that the testator intended that the legacy should be paid out of his real estate, if necessary.

The legacy is not directed to be paid by the executors. It is given in lieu of dower, which I think shows that the testa-

Fleury agt. Roger.

tor's intention was, that it should be paid at all events; and the devise and bequest to his mother is not of any specified estate, but of the rest and residue of his *real* and personal estate. In the case of Aubrey agt. Middleton, (4 *Vin. Ab.* 468, *sec.* 15.) The word *residue*, when taken in connection with the other provisions of the will, was considered a sufficient indication of the testator's intention to charge the legacies on the real estate. And in the case of Cole agt. Turner, (4 *Russ.* 376,) it was held by Sir G. LEACH, that the word *residue* meant what remained after some prior purpose was satisfied, and that as no prior purpose was indicated, except the satisfaction of the annuity and legacies previously given, they were a charge upon the freehold. In the case of Nichols agt. Portelthwaite, (4 *Dall.* 131,) the same effect was given to the word *residue*.

I think that the legacy in question in this case is a charge upon the real estate, and the plaintiff is entitled to judgment accordingly.

SUPERIOR COURT.

FLEURY agt. ROGER.

An answer verified, which alleges, that as to the averment in the complaint that the plaintiff is the lawful holder and owner of said promissory note, and that the defendant is indebted to him thereon in the sum of \$—— and interest, "the defendant has no knowledge or information sufficient to form a belief, and can therefore neither admit nor deny the same,"—*held* to be sham and frivolous, and stricken out, with \$10 costs. (*This and the two following decisions seem to be in accordance with the views of BACON, J., in Ostrom agt. Bixby, ante, p. 57, in reference to striking out a verified pleading.*)

May Special Term, 1852. Motion to strike out answer. The action was brought on a promissory note,—declaration in the usual form,—containing an allegation that the plaintiff was the lawful holder and owner of the note, &c. The answer alleged "that the defendant has no knowledge to form a belief whether said plaintiff is the lawful owner and holder of the two promissory

Flammer agt. Kline.

notes set forth in the complaint in this action, as therein alleged." And an allegation, by way of new matter, that at the time of making and giving the notes the plaintiff agreed, that when the notes fell due the defendant might renew them, and give other notes, &c. The pleadings were verified.

J. B. COPPINGER, *for Motion.*

Mr. LOVELL, *Opposed.*

BOSWORTH, J.—Held the case under advisement a few days, and ordered the answer to be stricken out as sham and frivolous, with \$10 costs.

SUPERIOR COURT.

FLAMMER agt. KLINE.

Suit on promissory note for \$350. Usual allegation in complaint, that plaintiff is lawful holder and owner thereof. Defendant answers that, as to the averments in said complaint mentioned, that the plaintiff is the lawful owner and holder thereof, and that the defendant is indebted to him thereon in the sum of \$350 and interest, the defendant has no knowledge or information sufficient to form a belief, and can therefore neither admit nor deny the same.

On an order to show cause, plaintiff moves that the answer be stricken out as sham, irrelevant, and frivolous.

JAMES MORROGH, *for Motion.*

CHARLES T. PARKER, *Opposed.*

CAMPBELL, J.—Ordered that the answer of the defendant be stricken out, and that the plaintiff be at liberty to enter judgment, with \$10 costs.

Winne agt. Sickles.

SUPERIOR COURT.

FLEURY agt. BROWN.

July Term, 1852. This was a similar motion to the preceding case of Fleury agt. Roger. The complaint was on a promissory note, with allegations similar to those in that case.

The answer alleged that the defendant had been informed and believed that the plaintiff had passed away the note, &c., and was not now the lawful holder and owner, &c. The pleadings were verified.

J. B. COPPINGER, *for Motion.*J. F. ROBINSON, *Opposed.*

BOSWORTH, J.—Decided this motion in the same way—ordered the answer to be stricken out, with \$10 costs.

SUPREME COURT.

WINNE agt. SICKLES.

A motion to strike out an answer as false will be denied where it is founded on the *complaint*, which was served without oath, and subsequently verified, for the foundation of the motion. (*See White agt. Bennett, 7 How. Pr. R. 59.*) Under the Code, the defendant may deny generally the allegations of the complaint. When he does this, his answer amounts to the general issue, which cannot be stricken out as *false*; or, admitting some of the allegations, he may put others in issue by denying them. In neither case can the answer be said to be a *sham* answer. The defendant has a right to have the issue he has made tried in the usual manner. (*See Nichols agt. Jones, 6 How. Pr. R. 355; White agt. Bennett, 7 id. 59; Mier agt. Cartledge, 8 Barb. 75; 2 Code R. 125; Ostrom agt. Bixby, ante, p. 57; also the three preceding cases in the superior court.*)

Albany Special Term, June, 1852. Motion to strike out the defendant's answer, as false. The complaint alleges that in May, 1850, at the request and for the accommodation of the defendant, the plaintiff became a joint maker with him of a

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promissory note for \$500, a part of which was subsequently paid by the defendant; that on the 11th of February, 1852, a judgment was recovered against the plaintiff and the defendant for the balance of the note, and that the plaintiff had paid such judgment, amounting to \$292,37—for which sum, with interest, he claimed judgment.

The answer denies all the allegations in the complaint, except the recovery of the judgment. Neither the complaint nor the answer is verified.

The plaintiff, in the affidavit upon which the motion is founded, swears to the truth of the allegations in the complaint, and that the defendant, when being examined upon oath in proceedings before the county judge, under the act to abolish imprisonment for debt, had testified “that he was indebted to the plaintiff in about the sum claimed in the complaint.”

The defendant, in his affidavit to oppose the motion, swears that “he has no knowledge or information sufficient to form a belief whether the plaintiff has ever paid the judgment or any part thereof, as mentioned in his affidavit and in the pleadings.”

W. BARNES, *for Plaintiff.*

W. S. PADDOCK, *for Defendant.*

HARRIS, Justice. The same question which this motion presents was decided against the same attorney who makes this motion in White agt. Bennett, in June, 1851. (7 *How. Pr. R.* 59.) The opinion in that case was delivered *eight months* before Nichols agt. Jones, (6 *How.* 355,) cited by the plaintiff's counsel, arose. There, as in this case, the plaintiff's attorney had served his complaint without verification. There, as in this case, the defendant had put in his answer, merely denying the allegations of the complaint, without oath. And there, too, the plaintiff's attorney, upon an affidavit verifying his complaint, moved to strike out the answer as false. There, as here, the plaintiff's counsel relied upon the case of Mier agt. Cartledge (8 *Barb.* 75; *S. C.*, 2 *Code R.* 125) to sustain his practice. I took occasion to show, upon the former motion, that the only question decided in Mier agt. Cartledge was that, when

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a pleading is properly verified, it will not be stricken out as false. The question here involved was not before the court, and the remarks of Judge EDMONDS upon this question, although entitled to respect, are but *obiter dicta*. The only other case upon which the plaintiff's counsel relies is that of Nichols agt. Jones. That case will be valuable, undoubtedly, for its *definitions*. The learned judge has, with great clearness, and, in my judgment, with entire accuracy, distinguished between such pleadings as may be treated as *sham*, and those which are *frivolous*; and shown to what cases the several sections of the Code noticed by him are properly applicable. In this respect he has rendered a useful service. But I see nothing in all that is said in that case from which it can be even inferred that the author of that opinion would himself, under any circumstances, strike out, as false, an answer which *affirms nothing*, but merely takes issue upon what is affirmed by the plaintiff. Much less can it be pretended that any such proposition has been decided by him. All that is adjudged in that case is, that, where a plaintiff alleges in his complaint that the defendant is indebted to him on account, for goods sold, in the sum of \$684,48, and the defendant in his answer says "he has no recollection sufficient to form a belief as to the specific sum to which the bills of goods amount, and can therefore neither admit nor deny that he remains indebted to the plaintiff in the sum of \$684,48," such an answer, though not a *sham* defense, is *frivolous*. It does not amount to a denial of the plaintiff's allegations. Upon this question no two judges would be likely to differ.

The power of the court to strike out a sham or false answer or defence is retained by the 152d section of the Code. The principles by which the court is to be governed in the exercise of this power have not been changed. Under the former practice the plea of the general issue was never stricken out as false. The obvious reason for making this exception is found in the nature of the plea itself. It merely refers the plaintiff to the proof of his cause of action, as he has alleged it to exist. It *affirms* nothing to be true, and, therefore, can scarcely be said to be a sham or false plea. So, under the Code, the

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defendant may deny, generally, the allegations of the complaint. When he does this, his answer amounts to the general issue; or, admitting some of the allegations, he may put others in issue by denying them. In neither case can the answer be said to be a sham answer. In either case the defendant has a right to have the issue he has made tried in the usual manner. (See Davis agt. Potter, 4 How. 185.)

The motion must be denied, with costs.

SUPREME COURT.

LOVETT agt. THE GERMAN REFORMED CHURCH AND OTHERS.

Under a mortgage foreclosure and sale, the tenant in possession, who has been made a party, is bound to *attorn* to the purchaser, or *be removed by writ of assistance*, notwithstanding he claims under an unexpired lease of several years, executed by the mortgagors *previous* to the date of the mortgage foreclosed.

New-York Special Term, January, 1853. Motion by plaintiff for writ of assistance against defendant, Charles Daniels.

The plaintiff filed his bill in 1845, to foreclose a mortgage executed to him by the German Reformed Church, and made Daniels and others parties. In 1849 there was the ordinary decree of sale and foreclosure in the old chancery form. Lately there has been a sale under the decree, and a deed was executed to the plaintiff as purchaser, and his agent with the deed and a certified copy of the decree, after the report of sale was confirmed, and with a power of attorney for the plaintiff, demanded of Daniels that he should surrender the possession, or attorn to the plaintiff. Daniels refused, and the plaintiff, on notice to him, applies for a writ of assistance.

S. F. COWDREY, *for Plaintiff.*

H. M. WESTERN, *Opposed.*

MITCHELL, Justice. Daniels was in possession when the

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action was commenced, and he was served with the subpoena to answer, as tenant of Gosman, who held a lease from the church for ten years from May, 1838, with a clause allowing him to remain in possession on the same terms until the church should want the land for building, and give three months' notice. Gosman assigned the lease to Davis, and Davis in 1849 assigned it to Daniels, who claims now to hold under it. As he claims to hold under that lease, and it was executed by the church, and the plaintiff has succeeded to the rights of the church, and thus become the assignee of the lessor,—Daniels in claiming under that lease claims substantially under the plaintiff. He should therefore attorn to him from the very nature of his claim, and that affords no reason why he should not be removed by the summary process of the writ of assistance, if he refuses to attorn. He was a party originally to the suit, and although he claims now under an assignment of a lease which was executed before the mortgage was executed, and therefore may object that the lease is to be sustained, notwithstanding the mortgage, because any attempt to defeat the lease would be an attempt to defeat a prior title, yet he cannot object to perform the act of fealty, which results from the very lease under which he claims, namely, to attorn to the landlord who under that lease is entitled to the rents. If he were to refuse to hold under that lease, (which he has not done,) that would be an act of disfealty which would make his holding adverse to his landlord, and entitle his landlord to evict him, notwithstanding the lease. As he does not so refuse, but sets up the lease, he must comply with its terms and attorn to the new landlord under it, and pay rent to him.

It is true, Gosman and Davis were not parties, and that would be material if the application were against them and for the purpose of defeating the lease, but it would be immaterial if the application were as here, not to defeat the lease but to carry it out, and if, as here, the court had jurisdiction over them by their being parties, as Daniels is. The court can then use its summary process against any party to the suit to carry out the requirements of the decree.

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Summers set up a title through Mr. Western, who claims adversely to the mortgagee ; but he does not connect himself in any way with Daniels, nor does Daniels venture to claim and hold under him, and so adversely to the mortgagee. The validity of this title is not to be passed upon here, but is to be settled in the suit already pending between this plaintiff and Mr. Western and the church, or in some other action.

Let the order be that the writ of assistance issue against Mr. Daniels unless he attorn in writing to Mr. Lovett, acknowledging that Mr. Lovett is the assignor of the church under the mortgage to him, and the foreclosure thereof and sale thereunder, and that he will pay the rent reserved by the lease to Mr. Lovett.

The attornment to be within five days after service on him of a copy of the order to be entered, or at his present place of residence, or on his attorney. The order to reserve all rights of Summers and of Mr. Western, as if this motion had not been made.

NOTE. The five preceding cases, (calling the superior court decisions one,) to wit: Luce agt. Tremper; Flynn agt. Croniken; Fleury agt. Roger, &c.; Winne agt. Sickles; and Lovett agt. The German Reformed Church, were recently found among some *published* opinions in the hands of the reporter. It is, perhaps, unnecessary to say, that the accident accounts for the delay in reporting them.

SUPREME COURT.

VAN VECHTEN AND OTHERS, TRUSTEES, &c., agt. PRUYN.

A notice of protest cannot be regularly served by mail, where the endorser, with his family, reside in the same village with the notary, where the bank is located, and where, through the post office, he receives letters, although it appears that the only office or place of business of the endorser is in a distant city, where he remains the largest portion of the time, and where he receives, through the latter post office, individual and business letters, and to which he

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ter address the notices were sent. No designation of residence by the endorser on the note.

Under such circumstances, the service must be made under the general rule, by delivering it personally to the party, or by leaving it at his domicil or place of business.

General Term, Dec. 1853. PARKER, WRIGHT, and HARRIS, Justices. This case was submitted to the court without action, pursuant to chap 1, title 12, part 2 of the Code, passed April 12, 1848, and the several acts amendatory thereof.

The following are, substantially, the facts agreed upon between the parties.

The plaintiffs were the trustees of the Catskill Bank, and holders and owners of three promissory notes drawn by J. V., and endorsed by the defendant, which had been discounted by the bank for the benefit of the drawer. These notes respectively matured and became due, Oct. 1, 1851, Nov. 25, 1851, and Feb. 14, 1852; on which respective days they were presented at the bank for payment and payment refused; that afterward, on the same days respectively, notices in due form of the presentment, demand, and non-payment of said notes, signed by a notary public residing in Catskill, were given to the defendant by depositing them in the post office in the village of Catskill, directed to the said defendant, city of New-York.

That the defendant, together with his family, from the first day of April, 1850, up to and at the time the notices of protest were sent to defendant, as aforesaid, resided within two hundred yards of the Catskill Bank, in the village of Catskill; such residence being well known to the notary and the officers of the bank. That the defendant was personally at his office of business in the city of New-York from Monday night to Friday night of each week, and from Friday night until Monday night of the following week he was generally with his family in said village of Catskill. That the defendant's office in New-York was his only place of business until March, 1852. That the defendant, in company with another, kept a letter-box at the post office in the city of New-York, and there received individual and business letters; but the defendant kept no separate box at the New-York post

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office. That letters and papers were also received by the defendant at the post office in the village of Catskill, where he kept a postage account and letter-box. That he received letters addressed to him at the New-York post office, but he does not admit that he received all letters so addressed. That there was no place of residence of said defendant designated under said endorsements or otherwise appearing on said notes or either of them. Admitted that the plaintiffs were the proper persons to bring an action and to submit this case.

JOHN ADAMS, *for Plaintiffs.*

J. H. REYNOLDS, *for Defendant.*

By the Court—PARKER, P. J. Where the holder of a note and the party entitled to notice both reside in the same city or town, the general rule is, that notice must be given to the party entitled to it, either personally or by leaving it at his domicile or place of business. Ireland agt. Kipp, (10 *John* 490; *S. C.* 11, *ib.* 231; *Story on Prom. Notes*, § 812, and cases cited in *note.*) In such case, service by mail is insufficient. The only exceptions to this rule are, where there is more than one post office in the city or town, or where the endorser, though residing in the same town, lives at a great distance from the post office, and receives his letters at a nearer post office in a neighboring town. Ransom agt. Meech, (2 *Wend R.* 587; Sheldon agt. Benham, 4 *Wend. R.* 129; *Story on Prom. Notes*, § 322.) In that case, notice may be served by depositing it in the post office, if there is a regular communication by mail. But if both parties reside in the same village, the service cannot be made through the post office. It is not enough in such case to leave the notice at the post office to be delivered to the endorser when he calls for letters, but if not served personally, it must be left at his domicile or place of business. The notice may be sent through the post office when it is to be carried by mail, but not when it is left for delivery only.

In the case before us, therefore, a notice deposited in the post office at Catskill addressed to the defendant at Catskill, the place of his residence, would have been insufficient.

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But the notices were deposited in the post office at Catskill, directed to the defendant at the city of New-York, where he kept his office for law business, and where he passed the greater portion of his time. And the question is thus presented, whether it was sufficient to send the notices by mail from the place of his residence to a place more than one hundred miles distant, when it would not have been sufficient to mail them at the place of his residence, directed to him at the same place. The defendant had a post office box at Catskill, and received letters there as well as at New-York; and it is evident the delay in sending to New-York must necessarily have been much greater than that which it is certain the law would not have tolerated in mailing it directed to Catskill.

No adjudged case can be found sanctioning such a practice. In *Morris agt. Husson*, (4 *Sand. S. C. Rep.* 93,) both the maker and endorser resided in Brooklyn, and a notice, sent by mail to the endorser's place of business in New-York, was held sufficient to charge him; but in that case it appeared the endorser had written "13 Chambers-street" under his name, and the notice was sent to that place in pursuance of such direction. It is always competent for the endorser to direct to what place notice shall be sent. (*Story on Prom. Notes*, § 314.) In this case, the defendant gave no direction, and the plaintiffs were bound to pursue a strictly legal course to charge the endorser.

It has been held that where a party resides in one town and does business and receives his letters in another, notice may be sent to either. *Bank of Geneva agt. Howlett*, (4 *Wend.* 328.) But that rule has never been applied to a case where an endorser resided and received letters at the post office in the same village in which the protest was made. In such case, I do not think it is sufficient to send the notice to the town where the endorser transacts business, though it appears that he also receives letters there. The mode of service would be different at the two places, and to give the holder his option as to the place where service should be made, would be permitting him to avail himself of the more dilatory service by mail, by sending to the place of business, instead of making the personal or

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actual service to which the endorser would be entitled, if served at his residence. There is a good reason for enforcing the application of the rule laid down in the *Bank of Geneva agt. Howlett*, to cases where the notice is sent from neither the town where the endorser resides, nor from that in which he transacts business. In such case, the right to send notice by mail existing as to both, the endorser is not delayed or prejudiced by the holder enjoying the right of electing to which town he will send the notice.

The service of notices in this case was not sufficient to charge the defendant as endorser, and judgment must be entered in favor of the defendant.

SUPREME COURT.

DAVISON agt. THE ASSOCIATION FOR THE EXHIBITION OF THE INDUSTRY OF ALL NATIONS.

The association, under their charter, are not liable upon an implied warranty for injuries done to the property of the exhibitors deposited in the Crystal Palace, by reason of rain driving through that building—no special agreement or negligence alleged.

New-York Special Term, April, 1854. The plaintiff, one of the exhibitors at the Crystal Palace, sues the association for the consequences of alleged imperfection in the construction of the building, the same “not having,” he says, “been built watertight.” His “Hebrew work of art”—that is the name by which the article exhibited was known, being one of three “pictures in penmanship”—of the value of five hundred dollars, “by reason of rain beating in and through said building and upon the same, became so greatly damaged as to be wholly lost to the plaintiff.”

To the claim thus presented the association demur, and insist that, having been guilty of no negligence—for none is charged in the complaint—they are not responsible for damages resulting from the elements; and the question is, does the charter of

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the association, for no express engagement is pretended, necessarily imply a warranty to the exhibitors that their goods shall, under no circumstances, and from no cause, sustain any injury?

for Motion.

Opposed.

ROOSEVELT, Justice. The plaintiff seeks to apply to the case the rigid law of common carriers. He can only do so by analogy; for no carriage by the defendants, whether common or otherwise, was undertaken or asked for. The goods, by clear mutual understanding, were to be stationary. They were not to be transported by the company or by anybody. And, even in such a case, where a canal boat had been arrested by frost, and the merchant's goods thereby greatly delayed and his profits diminished, he was held to be without remedy. (Bowman agt. Teall, 23 *Wend.* 306.) It is a sufficient answer, however, to this point to say that the law of common carriers is special and exceptional, resting on reasons peculiar to itself, and that it should not be extended. (14 *Wend.* 215; 7 *Cow.* 797.)

The defendants can only be liable, if at all, as bailers—that is, for the want of ordinary care and diligence. (Aymar agt. Astor, 6 *Cow.* 266.) A warehouseman, not charged with negligence, is not responsible for injury to the goods entrusted to him, nor for embezzlement, (9 *Wend.* 60 and 268;) and the burden of proof, even in case of negligence, lies on the owner of the goods. (*Foot v. Storms*, 2 *Barb.* 326.) If the warehouseman has bestowed upon his customer's property the same care as a prudent man would bestow upon his own, he has done all that either the law or common justice would require at his hands.

Now the Crystal Palace, as it appears, was not built watertight. But no building, especially one of glass, was ever erected so perfect that, in a violent storm of hail and rain, the elements might not, in spite of every precaution, do some damage. This the plaintiff knew; and, in the absence of express guarantee, he must be presumed to have made his deposit subject to such a contingency. He saw the edifice, and voluntarily assumed the

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risk. All he had a right to take for granted was, that it had been constructed with reasonable care, and in that respect he does not pretend that he was deceived.

The complaint must therefore be dismissed, with costs, unless the plaintiff pay the costs of the demurrer and amend in twenty days.

SUPREME COURT.

COMPTON agt. GREEN & IDE.

The mere *pendency* of another action between the same parties does not constitute a legal bar in any case. It must be shown that the action has been brought to a *trial*, in order to plead it in bar effectually.

By the true construction of *section 50, sub. 7*, of the justices' act, (2 R. S. 234,) the *set off* there mentioned must be of a demand existing against the plaintiff or plaintiffs *alone*, and not against him or them together with others.

The pendency of a former action between the same parties, for the same cause, may be pleaded in *abatement* to the second action where the latter action is *vexatious*.

Where, in an action upon a note and upon an account, the defendants in their answer allege they were formerly copartners—that before the commencement of this action one of them duly assigned all his interest in an account against the plaintiff to the other—that there was then an action pending and undetermined before a justice of the peace, in which one of the defendants, the assignee of the account, was plaintiff, and the present plaintiff was defendant, claiming to recover for such account, and in which action the present plaintiff claimed to *set off his account* in this action—*held*, on demurrer to the answer, that the plaintiff in this action was not bound to rely upon enforcing his demand against one of the defendants, when both were liable. Besides, the set off in the first action could not have been *effectual*—not being against that plaintiff alone in that action.

Steuben Circuit and Special Term, May, 1853. Demurrer to answer.—The complaint contains two counts or statements of causes of action: one upon a note and the other upon an account for goods sold, &c.

The answer demurred to states that on the first day of June, 1851, and from that time to the commencement of this action, the defendants were copartners in the business of blacksmith-

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ing. That on the first day of January, 1853, the plaintiff was indebted to the defendants in \$100, for work and labor, &c. That since that time, and before the commencement of this action, the defendant Green duly assigned all his interest in said account to the defendant Ide. That at the time of the commencement of this action there was an action pending and undetermined before George S. Pattison, a justice of the peace of Steuben county, in which said Ide is plaintiff and this plaintiff is defendant, and in which said Ide claims to recover for the said account against the present plaintiff, and in which the present plaintiff claims to set off against the aforesaid account the account mentioned in the complaint in this action.

To the defence, so set up, the plaintiff demurs, on the ground that such answer does not contain facts sufficient to constitute a defence.

The grounds of insufficiency are stated in the demurrer to be: 1st. That the answer does not allege or show that the action before the justice is pending and undetermined. 2d. That it does not allege or show that the said action before the justice has been tried and submitted, or that the plaintiff's account in this action has been submitted to or passed upon by the justice.

D. J. SUNDERLIN, *for Plaintiff.*

B. BENNETT, *for Defendants.*

WELLES, Justice. The matters of defence set up in the answer in question do not amount to a bar to the action, as there is not enough alleged to give them that effect. It is not shown that the action before the justice has ever been brought to a trial, and until that appears, nothing has occurred to bar the plaintiff from sustaining this action. The mere pendency of another action between the same parties does not constitute a legal bar in any case.

But it seems to me there is a more serious objection to this answer. The action before the justice was in favor of only one of these defendants, and the claim for which this action is brought is against both of them. If this plaintiff was bound to set off the present demand in the action brought by Ide, he

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would be obliged to be content with a judgment against him alone for any balance which might be found due to him, not exceeding one hundred dollars. (2 R. S. 235, § 52.) It is obvious, that if this were allowed great abuse and injustice might be practised. A man might have a legal demand against two persons jointly, one of whom is solvent and the other insolvent, amounting to one hundred and ten dollars, and they might have a demand against him amounting to ten dollars. The solvent one of the former only has to sell and assign his interest in the ten dollar demand to the insolvent one, and he to bring his action, and thus the only one of the two who is able escapes the payment of the balance.

By sub. 7 of section 50 of the justices' act, (2 R. S. 234,) the set off must be of a demand existing against the plaintiff in the action. The true construction, I think, of this subdivision is that the set off must be of a demand existing against the plaintiff or plaintiffs alone, and not against him or them together with others.

The matter of the answer is put forth as a statute bar under section 57 of the statute before mentioned. It cannot be regarded as matter in abatement.

The pendency of a former action between the same parties, for the same cause, may be pleaded in abatement to the second action. The object of this rule is to prevent vexation, (*Gould's Pleading*, ch. 5, § 122, p. 283,) and the plea can never prevail except in cases where the second suit is vexatious. That cannot be said of this action, because it is the only one the plaintiff has brought. He was not bound, for the reasons suggested when considering the answer as a bar, to rely upon enforcing his demand against one of the defendants, when both of them were liable. That he claimed the right to set off his demand before the justice, does not alter the case, because, 1st. It was not a case allowing of setting it off, as before shown; and, 2d. It was in his power to have withdrawn it, and *non constat* but he has; and, 3d. If he had set it off in the first action, it would, for the reasons before mentioned, have been *ineffectual*. (*Gould's Pl.*, ch. 5, § 126, p. 285.)

In my opinion plaintiff is entitled to judgment on the demurrer.

Farnham agt. Farnham.

SUPREME COURT.

FARNHAM, by Nelson, her next friend, agt. FARNHAM.

C. CRAMER, *for Plaintiff.*J. LAWRENCE, *for Defendant.*

In this case the defendant, who had removed out of the state, beyond the jurisdiction of the court, after suit brought, neglected to pay a sum of money previously directed by an order of the court to be paid for plaintiff's costs and counsel fees, and an execution was issued therefor and returned unsatisfied.

On application upon notice, PARKER, Justice, made an order that defendant pay the amount allowed by the first order and ten dollars, costs of this motion, in twenty days, or in default thereof that his answer be struck out, and the cause proceed as if no answer had been put in.

SUPREME COURT.

MATTHEWSON agt. THOMPSON AND ANOTHER.

Where two defendants, one a plaintiff in an execution, the other a constable, were sued for taking property, and appeared by different attorneys, and succeeded in the defence, on a motion for an *extra allowance* to each—*held*, that the defendants, having succeeded in receiving a double bill of costs for a single defence, that would answer, without an extra allowance.

Albany Special Term, January, 1854. Motion for extra allowance.—Two defendants were sued, the one the plaintiff in an execution, and the other the constable who held the execution, for taking property of the plaintiff by virtue of the execution against another person. The defendants appeared by different attorneys, and, having succeeded in their defence, each moved for an extra allowance of costs.

D. McELWAIN, *for Plaintiff.*J. M. TUTTLE, *for Defendants.*

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HARRIS, Justice. There was, in fact, but one defence in the action. The constable undoubtedly acted under the direction of the plaintiff in the execution. It was for him to conduct the defence. By severing in their defence, the defendants have become entitled to two bills of costs. Having thus succeeded in recovering double the amount of costs prescribed for a single defence, I do not feel authorized to increase the recovery still more by granting to either party an extra allowance. The motion must therefore be denied.

SUPREME COURT.

MONTGOMERY agt. JOHNSON.

Where the plaintiff purchased a pew in a church, in pursuance of an assessment sale made by the trustees, under a resolution to raise funds to repair and paint the church, &c., and the defendant in possession claimed title under a sale made to him many years previous by the trustees of the church—*held*, that neither plaintiff nor defendant had any title in fee to the pew; it appearing that the church was incorporated under the general statutory act for the incorporation of religious societies, passed March 27, 1801; which act did not vest any power in the trustees to sell or dispose, in fee, of any real estate.

The plaintiff, therefore, not being able to show a better title than the defendant, could not sustain his action for the possession of the pew.

Submitted, Steuben Circuit and Special Term, May, 1853. Complaint states that the plaintiff is owner in fee of a slip or seat known as No. 82, in the Presbyterian meeting-house in the village of Prattsburgh. That defendant is in possession of said slip, and unlawfully withholds possession thereof from plaintiff, and plaintiff prays judgment that defendant surrender the same to the plaintiff.

The answer

First. Denies that the plaintiff is the owner of the slip or seat, or that defendant wrongfully withholds it, &c.

Second. States the following facts :

That in 1807 a religious corporation was formed in the usual way in the town of Prattsburgh, by the name of the Pratts-

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burgh Religious Society, which corporation has continued in existence until the commencement of this action.

That in 1821 the society built a meeting-house, in which they have since held their religious meetings. The house was erected on lands belonging to the corporation.

That in 1845 the society remodeled and enlarged the said meeting-house, and, to pay the expenses of which, the society, on the 10th day of March, 1845, by resolution properly entered upon their book of records, directed the trustees to sell the slips or seats in said house to the highest bidders.

That, in pursuance of said resolution, the trustees afterward advertised and sold the seats and slips to the highest bidders; at which sale one Daniel Tichnor bid off and purchased the slip number 82, mentioned in the complaint, who afterward sold the same to the defendant. That the defendant paid the trustees for the slip, and the trustees gave him a certificate in words and figures following, viz.:

“Slip No. 82, \$36,00. This certifies that Samuel A. Johnson has paid to the trustees of Prattsburgh Religious Society \$36,00 dollars, which is in full for slip No. 82. By order of the trustees, Prattsburgh, 1846.

“JAMES H. HOPKINS, *Clerk.*”

That the said sale was made by the said trustees without any condition or reservation whatever; since which time the defendant has been in the possession and occupancy of said slip, as owner thereof, and has never sold or conveyed the same to any one.

The reply states:

That on the 27th September, 1852, the society described in the answer, at a regular meeting adopted and made record of resolutions as follows, viz.:

“*Resolved*, That we paint the outside of the meeting-house with three coats, fix the windows, put a ventilator in the upper wall, and make other necessary repairs, and that the funds be raised by taxing the seats. .

“*Resolved*, That the trustees of this society shall, within thirty days after an assessment is made, leave in each slip a

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card with the amount so assessed on it, and that shall be considered a legal notice.

“Resolved, That all assessments shall be considered as falling due thirty days after said notice, unless the notice shall specify a time.

“Resolved, That if any person assessed shall neglect or refuse to pay such assessment within three months, it shall then be lawful for the trustees to take possession of said seat or seats and sell them, and out of the proceeds of said sale retain the amount of the assessment with interest, returning the surplus, if any, to the owner thereof.”

That on the 15th day of November next after the passage of the above resolutions the society adopted the following resolution, viz. :

“Resolved, That the trustees employ a sexton, furnish wood and lights, and lay a tax on the slips to raise the funds, &c.”

That, in pursuance and in virtue of said resolutions, the trustees made assessments upon the slips and seats, leaving in each seat or slip a card with the amount of the assessment thereon for the space of thirty days, after which time, and after the expiration of the term of three months thereafter, they advertised and sold at public auction all the slips and seats in said house belonging to persons who had neglected or refused to pay their assessments so made thereon. That the defendant was the owner of four slips in said house, including the one in question. That an assessment was made by the trustees, as aforesaid, upon said four slips. That the defendant neglected and refused to pay the same, and the trustees advertised and sold all of the said four slips for said assessments on the 11th day of March, 1853, at which time the plaintiff bid off and purchased the slip in question, and paid to the trustees therefor the sum of \$12,50.

By a stipulation in writing, executed by the parties respectively, the following admissions are made :

That the statements contained in the defendant's answer and the plaintiff's reply in relation to the organization of the society, resolutions, records, and other proceedings, are true. That

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the records of said society show that the slip in question was sold to Daniel Tichnor in the year 1845, without any reservation. That on the 11th of March, 1853, the trustees sold the slips, or a part of them, for taxes levied to raise money to pay for painting the house, lighting the same, and ringing the bell, &c. That before the sale commenced, the trustees declared that they would sell only the society's interest in the slips. That the defendant was the owner or holder of four slips, which were all taxed and sold. That the two first sold brought money enough to pay the taxes on all the defendant's slips, but the trustees continued to sell the others; and that the one last sold is the slip in question. Also, that the defendant gave the trustees notice that they must not tax or sell his slips.

A trial by jury was waived by the parties, and the case was submitted to the justice holding the circuit, upon the pleadings and the above stipulation, and upon the written briefs of the parties in person.

A. C. MONTGOMERY, *plaintiff in person.*

S. A. JOHNSON, *defendant in person.*

WELLES, Justice. The answer states that in 1807 a religious society was formed *in the usual way* in the town of Prattsburgh, by the name of "The Prattsburgh Religious Society," &c. The defendant derives his title from the trustees of this society by purchase; and one question presented is, whether the trustees had the power to confer upon him any such title as he claims. The answer states that the corporation was formed *in the usual way*. I know of no usual way of creating religious incorporations, which existed at the time this one came into existence, but that prescribed in the act entitled "An act to provide for the incorporation of religious societies," passed March 27th, 1801. (1 K. & R. 336; *Ed. of the statutes published by Chas. R. and Geo. Webster, Albany, 1802.*) I shall assume, therefore, that the "Prattsburgh Religious Society" was incorporated in pursuance of that act, which contains no provision conferring authority upon the trustees to sell any por-

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tion of the real estate. The 4th section, which enumerates the powers of trustees of religious corporations, contains the following clause :

“ And such trustees shall also have power to make rules and orders for managing the temporal affairs of such Church, congregation, or society, and to dispose of all moneys belonging thereto, and to regulate and order the renting the pews in their churches and meeting-houses, and the perquisites for breaking of the ground in the cemetery or church-yards and in the said churches and meeting-houses, for burying the dead, and all other matters relating to the temporal concerns and revenues of such Church, congregation, or society,” &c.

There is no other section or clause in the act which vests in the trustees any power of alienation or disposition of the pews in the church or meeting-house. And this is certainly not a power to sell or dispose of in fee. It is no more than a power to lease the pews for a limited time, with a reservation of rent. The same provision is contained in the act of the same title, re-enacted with additional provisions April 5, 1813. (1 R. L. 212; 3 R. S. 244, 8d ed.) By the eleventh section of the last-mentioned act, the chancellor has power, on application of any religious corporation, to order the sale of the real estate belonging to such corporation. There is no pretence that the sale of the slip in question to Tichnor was under or in pursuance of this section. The general common law power of corporations in regard to the disposition of their property, real as well as personal, is coextensive with that of natural persons. It is not limited as to objects or circumscribed as to quantity. But with regard to religious corporations, chancellor Kent says :—“ The better opinion upon the construction of the statute *for the incorporation of religious societies* is, that no religious corporation can sell in fee any real estate without the chancellor’s order. The powers given to religious societies, incorporated under that act, are limited to purchase and hold real estate, and then to demise, lease, and improve the same for the use of the congregation. This limitation of the corporate power to sell is confined to religious corporations; and all others can buy and sell at

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pleasure, except so far as they may be specially restricted by their charters or by statute." (2 *Kent's Com.* 281.)

In the case of *Vielie agt. Osgood*, (8 *Barb. S. C. R.* 130,) it was held by the general term in the 4th district, *PAIGE, WILLARD, and HAND*, Justices, that the trustees of a religious corporation, under the act before referred to, have not the power to sell and convey by an absolute deed in fee a slip in the church or meeting-house. That such power is limited to a demise or lease of the real estate of the corporation, or to the renting of the pews in the church of the corporation. See also *Voorhees and wife agt. the Presbyterian Church of Amsterdam*, (8 *Barb. S. C. R.* 135,) and the *Reformed Protestant Dutch Church of Garden-st. agt. Mott and others*, (7th *Paige R.* 77.) There are no authorities, which I have met with, in conflict with those to which I have referred. Applying the principles deducible from those to the present case, it seems to follow, that neither *Tichnor* nor *Johnson*, the defendant, have acquired any title to the slip in question.

But how stands the case with the plaintiff? Has he acquired any title? Most clearly not, if the views above expressed are sound. The action proceeds upon the assumption that the defendant is in the possession and occupancy of the slip, and is in the place of the former action of ejectment by the plaintiff to recover the possession from the defendant. In order to recover he must show a title in himself better than that of defendant. This he has not done. No one, it seems to me, but the trustees of the society can deny the defendant's right to remain in the occupancy of the slip in question.

The plaintiff's claim is founded upon a purchase from the trustees, which was equally void, for want of power in the latter to sell, with the sale to the defendant.

The defendant is, in my opinion, entitled to judgment.

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SUPREME COURT.

MILLERED agt. THE LAKE ONTARIO, AUBURN, AND NEW-YORK
RAILROAD Co.

Under section 12 of the general Railroad Act of 1850, (*Laws of 1850, ch. 140*,) a railroad company organized under that act is liable to a laborer upon its road for labor performed in constructing such road, only where such labor has been performed under a contract made with, and is chargeable to, some person who has contracted *directly with such company* for the construction of some portion of its road.

That section of the act does not embrace a laborer under a *sub-contractor*. (*This seems to be adverse to the case of Warner agt. the Hudson River R. R. Co., 5 How. Pr. R. 454.*)

The statute is in derogation of the common law, and should be construed strictly, and not be extended by construction beyond the absolute requirements of the language used.

Seventh District Monroe General Term, March, 1854. Before SELDEN, JOHNSON, and WELLES, Justices.

Appeal from the Cayuga County Court. The defendants were a corporation organized under the general Railroad Act of 1850. (*Laws of 1850, chap. 140.*) In May, 1853, Hackley & Hungerford, contractors with the defendants for the construction of their railroad, were engaged in constructing the road, and entered into a sub-contract with one Deland to construct a portion of it. Deland hired the plaintiff as a foreman. The plaintiff worked upon the road forty-seven days, under Deland, for which Deland did not pay him. The plaintiff then served a notice upon the defendants, under § 12 of said act, in which notice he described himself as foreman, and claimed \$64 from the defendants. They refused to pay him, and he sued them in a justices' court. On the trial he proved that he was hired by Deland as a foreman, and that his duty was that of a foreman, and that his wages were higher than those of laborers. The defendants moved for a non-suit on two grounds: 1st. That Deland was not a *contractor* with them within the meaning of the general railroad act; 2d. That the plaintiff was not a laborer within the meaning of that act. The justice denied the

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motion for a non-suit, and rendered judgment for the plaintiff, which the county court affirmed, on appeal. The defendants then appealed to the supreme court.

CLARENCE A. SEWARD, *for Appellants.*

JAMES R. COX, *for Respondents.*

By the Court—SELDEN, Justice. The main question presented by the record in this case is, whether Deland, the immediate employer of the plaintiff, was a *contractor* within the meaning of § 12 of the general Railroad Act of 1850, which is as follows: "As often as any contractor for the construction of any part of a railroad, which is in progress of construction, shall be indebted to any laborer, for thirty or any less number of days, for labor performed in constructing said road, such laborer may give notice of such indebtedness to said company in the manner herein provided; and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. Such notice shall be given by said laborer, to said company, within twenty days after the performance of the number of days' labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days' labor, and the time when the same was performed, for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer, or his attorney; and shall be served on an engineer, agent, or superintendent employed by said company, having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent, or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section, unless the same is commenced within thirty days after notice is given to the company by such laborer as above provided."

A moment's reflection will satisfy any one, that whether we put upon the section the limited construction contended for by the defendants, or the enlarged and liberal interpretation claimed

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by the plaintiff, serious difficulties can be foreseen in its practical operation. If the term *contractor* is construed to embrace those only who contract directly with the corporation, then it is obvious that the effect of the provision might be entirely evaded on the part of a railroad company by entering into a contract with a single individual for the whole work, and allowing him to sublet it by sections. To accomplish this, however, it would be necessary that the contract should be real and not merely colorable. On the other hand, if the term is not limited to those who contract immediately with the company, it can have no limit short of including every sub-contractor, however remote. Under this construction, it would be indispensable to the security of the company, that it should have the state of the accounts of every sub-contractor on the line of the road. This would require of the company a watchfulness of remote details which would be not only onerous, but impracticable.

Difficulties of this sort will be found invariably to attend every departure from those plain and simple rules by which the obligation of contracts is determined. Every such deviation introduces into the law of contracts a foreign element which cannot, without difficulty, be made to harmonize with those principles of reason and natural justice upon which the system is based. That salutary rule, therefore, which requires all statutes in derogation of the common law to be construed strictly, applies with peculiar force to such a case. Such statutes are not to be extended by construction, and, if the terms in which they are couched will admit of two interpretations, that which will conform most nearly to the settled rules of the common law is in all cases to be adopted. A compliance with this rule would require us to construe the section in question so as to confine its operation to cases where the person contracting directly with the company has failed to pay his laborers, as this construction would interfere least with those established principles by which the rights and obligations of contracting parties are uniformly governed. It will be found, upon examination, that courts have always inclined against giving to statutes analogous to this such a construction as would extend their

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operation beyond the absolute requirements of the language used. (Wood agt. Donaldson, 22 *Wend.* 395; Steinmetz agt. Poudinot, 3 *Serg. and Raule*, 541; Truscott agt. Hall, 8 *Alabama*, 522.)

But there are other reasons leading to the same conclusion. The term *contractor*, as used in this statute, is unaccompanied by any words expressly limiting or defining its meaning. It is not to be supposed that the legislature designed to compel railroad companies to pay twice over for the same work or to impose upon them liabilities which they could not, by the exercise of proper vigilance and caution, guard against. If their responsibilities are limited to seeing that the obligations of their immediate contractors for work done upon their road are faithfully discharged, it is within their power to protect themselves by contracting only with men of character and responsibility, by requiring indemnity from those with whom they contract, or by withholding payment until their liability has ceased by lapse of time. But no precautions, however strict, could effectually guard against the responsibilities which would be thrown upon these companies if every grade of sub-contractor is held to be embraced within the provisions in question.

That the legislature intended that the railroad company should have the means of self-protection is indicated by the clause which requires the notice served upon the company to contain the name of the contractor from whom the debt is due. This clause must have had an object. It would seem that this object must have been to enable the company to withhold the amount due out of any sum which might be due to such contractor. But, in the case of a sub-contractor, this provision would be entirely nugatory. The company would have no control over his accounts, and no power to protect itself by retaining the money.

This, however, is not the only nor the most serious difficulty. Suppose that a railroad company, on receiving notice from the laborer under a sub-contractor, should pay the demand, what means has it of reimbursing itself? Could it retain the amount out of any sum which might be due to the original contract-

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or? Clearly not. Such contractor may have performed his entire contract with the company, and the statute contains not a syllable which would tend to release the company from any portion of its obligations to him, neither does it contain anything which would, even by implication, subrogate the company to the rights of the laborer as against the sub-contractor. If the company should be compelled to pay such a demand, it must inevitably, therefore, lose the amount paid. This consequence might not follow, if the liability of the company under the provision in question is limited to dues from the first contractor. Any sums which the company should be legally compelled to pay in consequence of the default of an original contractor, would probably diminish, *pro tanto*, its liability to such contractor; although, as the statute is silent on the subject, there would be some difficulty in giving to the company protection even to this extent, consistently with any established principles, unless its agreement with the contractor should contain a clause of indemnity.

If the legislature had intended to compel railroad companies to insure the responsibility and integrity, not only of every person to whom it should directly let any portion of its road, but also of every one who, without its privity or knowledge, should succeed in obtaining a job as a sub-contractor upon such road, it would, I think, at least, have provided some means by which the defaulting contractor could be made to refund to the company, provided the latter should be proceeded against under the statute.

For these reasons, among others, I am of opinion that railroad companies can only be made liable under the section of the statute in question, where the labor performed is chargeable to some person who has contracted directly with such company for the construction of some portion of its road.

This conclusion renders it unnecessary to notice the other points made upon the argument.

Judgment of county court and of justice reversed.

Diefendorf agt. House.

SUPREME COURT.

DIEFENDORF agt. HOUSE.

In an action of ejectment, commenced in 1845, the defendant obtained a verdict in May, 1846; and plaintiff made and served a case to obtain a new trial. Defendant died in 1851, and in November, 1853, his attorney on record served amendments, the attorney for the plaintiff having verbally consented to the delay in serving the amendments—*held*, that the suit was still in court.

Although the plaintiff cannot finally obtain judgment, as the suit would abate if the verdict were set aside, yet a judgment upon the verdict might be conclusive as to title.

The practice of entering up judgment on a verdict after more than two terms after the death of a party, depends upon a rule of common law, that where parties are hung up by act of law, neither of them loses his right, but eventually judgment is entered up *nunc pro tunc*, as if the party were alive.

But the delay must arise from the act of the court. And, as it is a matter of discretion, if *laches* are imputable to the party interested in the judgment, the courts have refused to interfere.

It is irregular to serve papers in a cause upon the attorney after he becomes a non-resident of the state.

Fourth District, Ballston General Term, May, 1854. HAND, P. J. CADY, ALLEN, and JAMES, Justices.

There were two motions in this case, one by each party, to strike the cause from the calendar. The plaintiff moved on the ground that the suit had abated by the death of defendant, and also that there was no good service of notice of argument; the defendant, on the ground that the plaintiff had not served a copy of the case, &c., and he asked for judgment upon the verdict.

The suit was an action of ejectment, commenced in 1845, and was tried in May, 1846, when the defendant had a verdict; and plaintiff made and served a case to set it aside.

No amendments were served until November, 1853; but the delay in serving amendments had been by the verbal consent of the attorney for the plaintiff. The defendant died in June, 1851. Mr. Darrow, the attorney for the plaintiff, had a partner until August, 1848, who principally took charge of the suit until the dissolution of the firm. D. went to the southern states in October last. After the death of the defendant, the plaintiff,

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supposing the suit had abated, received his papers in the cause from his attorney. The amendments and notice of argument were served on the former partner of Darrow, and the notice was also left at the last boarding-place of the latter.

H. ADAMS, *for Defendant.*

T. B. MITCHELL, *for Plaintiff.*

By the Court—HAND, P. J. If the attorney for the plaintiff had become a non-resident of the state, service of papers on him, in any manner, would be irregular; nor could his former partner act in his name. The statute prescribes the practice in such cases. (2 R. S. 297, § 67. Chautauque Co. Bank agt. Risley, 6 Hill, 375.) But it does not appear from the affidavits whether he became a non-resident. Probably he has not; and if so, service could only be made on him as the attorney of record, and not on his former partner after the copartnership had been dissolved, and known to be so by the attorney for defendant. And the withdrawal by the plaintiff of his papers did not affect the defendant. However, under the circumstances, the plaintiff should have an opportunity to proceed to get rid of the verdict, if he desires to do so. A verdict having been rendered in the cause, the suit did not abate by the death of the defendant. Otherwise, in an action of ejectment, where a sole defendant dies before verdict. (7 Pr. R. 81.) Where there has been a verdict, and judgment thereon has been prevented by steps taken by the opposing party to obtain a new trial, a delay of more than two terms does not prevent the court entering up judgment, *nunc pro tunc*, if the verdict finally stands. And it seems the practice does not depend upon the statute of 2d Car. 2, ch. 8, nor upon our statutes. (2 R. S. 386, §§ 1-4; *id.* 308, § 32.) “But on the rule of common law, that when parties are hung up by act of law, neither of them loses his right, but eventually judgment is entered up *nunc pro tunc*, as if the party were still alive.” (TINDALL, C. J., in Bridges agt. Smith, 8 Bing. 28; Spaulding agt. Congdon, 18 Wend. 548; Rightmyre agt. Durham, 12 *id.* 245; Springstead agt. Jayne, 4 Cow. 423; 2 Saund. R. 72, n. n. p.; Blavitt agt. Tregoning, 4 A. and E. 1002; Adams

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on *Eject.* 298; 2 *Tidd*, 846.) It seems, however, to be matter of discretion, and where the delay is imputable to the *laches* of the party interested in the judgment, the courts have refused to interfere. (Lawrence agt. Hodgson, 1 *Y. and J.* 368; Copley agt. Day, 4 *Taunt.* 702.) The delay must arise from the act of the court. (Lanman agt. *Ld. Audley*, 2 *M. and W.* 535.) There has been great delay in this case, and more than two terms have long since passed. But this seems to have been in consequence of a mutual understanding after the plaintiff had taken steps to prevent judgment and obtain a new trial; and judgment is sought against the party who is alive; and the plaintiff has not been prevented from proceeding.

If the plaintiff succeeds in setting the verdict aside, either on the case, or by payment of costs under the statute, the suit will then be abated; and it seems hard for him to be kept in court in a cause in which he cannot finally obtain judgment. The court refused to hear a motion to set aside a *non-suit* after the death of the plaintiff, in an action for an escape; as it was a mere question of costs. (Seymour agt. Deyo, 5 *Cow.* 289.) But the defendant has a verdict in this case, and the plaintiff has something more at stake than the costs; as the judgment may be conclusive as to title. (2 *R. S.* 309, § 36.)

The cause is still in court, and the motion should be denied, that the parties may proceed as they shall be advised.

Denied, without costs.

SUPREME COURT.

McSMITH agt. VAN DEUSEN.

Where an execution has been issued within five years from the entry of judgment, the party may issue execution at any time thereafter without application to the court.

May Special Term, 1854. This was a motion to set aside an execution against property, on the ground that it had been

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issued more than five years after the entering of judgment. It appeared that an execution against property had been issued and returned unsatisfied, soon after the recovery of the judgment, and less than five years before the issuing of the execution claimed to be irregular.

PARKER, Justice, denied the motion, and *held*, that no motion for leave to issue execution was necessary, except in cases where no execution had been issued within the five years, thus agreeing with MASON, J., in *Pierce agt. Crane*, (4 *How. Pr. Rep.* 257,) and differing from MITCHELL, J., in *Currie agt. Noyes*, (1 *Code Reporter*, 198, *new series*.)

He held that where an execution had been issued within the five years, the party might issue execution at any time thereafter without application to the court.

SUPREME COURT.

DENNISON agt. DENNISON.

By section 149 of the Code, a defendant can not answer the allegations in the complaint both by a *general and specific* denial. He must elect which mode of answering he will pursue, and having elected, he will be bound by it.

Where, in an answer, a specific denial of the allegations in the complaint follow a general denial of the same, the remedy is, to move to strike out the specific denial as *redundant*.

Where the facts upon which an allegation, by defendant, of defect of parties is founded, appear on the face of the complaint, the defendant should *demur*—not answer. (*Code*, § 144.)

Costs of a motion rest in the discretion of the justice who hears the motion; and the court, on appeal, ought not to interfere with his decision thereon. Indeed, an appeal can not be brought on a mere question of costs, because the merits are not involved; and the court should not consider that question when brought up collaterally with questions which are appealable.

Sixth District General Term, Jan. 1854. This is an appeal from an order made at special term held by Justice CRIFFEN, at Cortland, in July, 1853. The plaintiff made a motion to strike

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out certain portions of the amended answer to the complaint, on the ground of redundancy, &c., which motion was granted, with \$10 costs. Defendant appeals.

H. BENNETT, *for Appellant.*

H. O. SOUTHWORTH, *for Respondent.*

By the Court—SHANKLAND, Justice. The defendant commences his answer by a general denial of each and every allegation in the complaint; and then goes on to deny specifically nearly all of the allegations in detail. This he is not authorized to do by the Code. Section 149 allows a defendant to elect whether he will answer by a general, or a specific denial, and having elected, he is bound by it. He cannot answer in both modes. The general denial puts in issue every allegation of the complaint as fully as the specific denial could. The specific denials were unnecessary, and therefore redundant. The learned justice did right in striking out those specific denials.

It is now said, that it was erroneous to strike out those portions of the answer in which the defendant insists that John Doolittle and the wife of the plaintiff should have been made parties to the action. But as the facts on which the allegation of defect of parties is founded, appear on the face of the complaint, the defendant should have demurred. Section 144, sub. 4, authorizes a demurrer, where a defect of parties appears upon the face of the complaint; and section 147 allows the objection to be taken by the answer, when it does not appear on the face of the complaint. The inference is plain, that the objection cannot be taken in the answer, when it can be made available by demurrer. There was no error, therefore, in striking out those allegations.

The only mode of clearing the record of the objectionable matters contained in this answer, is by motion. It could not be got rid of by demurrer, for two reasons. First. A demurrer will not lie to an answer, unless it sets up a counter-claim. (*Code*, § 158, 8 *How. Pr. R.* 234, 8 *How.* 9.) Second. The matters contained in the answer, if true, constitute a good de-

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fence, if they had not been preceded by a general denial, which rendered the specific denial redundant, as before mentioned. The objection, that the plaintiff should have demurred to the answer, cannot be sustained.

It is said, that the court erred in giving costs to the plaintiff on motion, because the motion was granted only in part and denied in part. But we are of opinion that costs of the motion rested in the discretion of the justice who heard the motion, and that we ought not to interfere with his discretion on that question, on this appeal. Costs, on motions, are declared to be in the discretion of the court, not exceeding \$10. (§ 315.) Indeed, there is no appeal provided in the Code from such an order as this granting costs, inasmuch as the order does not involve the merits of the action or affect a substantial right. (*Code*, § 349.)

The order appealed from is affirmed, with \$10 costs.

SUPREME COURT.

ROGERS agt. RUNYAN AND OTHERS.

Where, in March, 1849, application was made to the commissioners of highways to lay out a certain road in the town, which they refused to do; and on an appeal the defendants were appointed referees under the statute to hear and act upon the appeal, who, on the 31st of July, 1849, made a final order reversing the order of the commissioners and directing them to proceed to lay out the road—*held*, that the referees, without any new order or appointment, some four years afterward, (January 15, 1854,) assuming to go on and complete the laying out of the road, could not do that; because their power and jurisdiction over the matter had gone. Besides, the laying out of the road was a duty assigned by statute to the commissioners.

Utica Special Term, March, 1854. It appears from the complaint that in March, 1849, an application was made to the commissioners of highways in the town of Plainfield to lay out a certain road in that town. That the commissioners refused to lay out the road, and thereupon an appeal was taken from this order; and that defendants, having been appointed referees

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under the statute, to hear and act upon the appeal, duly met and organized on the 29th day of July, 1849, and on the 31st of that month made an order reversing the order of the commissioners of highways, and directing them to proceed to lay out the road applied for.

The plaintiff alleges that this was their final order and determination, and was treated as such by them; and that, after making and filing the same, they adjourned without day. The complaint then alleges that on the 15th of January, 1854, the defendants again assumed to act as referees, without any new order or appointment, and proposed to proceed and lay out the road. That he is the owner of the land through which it is proposed to be run, and that it will be an injury and damage to him to have the road laid out, and he prays for an injunction restraining the proposed action of the defendants.

GEO. W. GRAY, *for Plaintiff.*

JAMES HYDE, *for Defendants.*

BACON, Justice. The question raised by the demurrer in this case is, whether the jurisdiction of the defendants, in the matter of laying out the road in question, terminated with what purported to be the final action taken by them in July, 1849, or whether, after the lapse of some four and a half years from such action and determination, they can reassemble, under their original appointment, assume their jurisdiction over the subject matter, and complete what is alleged to have been left "*Re infecta.*"

The demurrer admits all of the facts alleged, and this brings up the question whether the power of the defendants, under their original appointment, was not terminated with the order of the 31st of July, 1849. The defendants undoubtedly mistook the powers possessed by them and referred to the commissioners, to go on and complete the laying out the road, a duty which by statute was confided to them. But having voluntarily abdicated their powers, and, in effect, terminated their existence, by making what purported to be their final order, and adjourning without day, I am of the opinion that they can not now resume their abandoned jurisdiction, and proceed to adjudicate upon a state

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of facts, which may be materially different from those which existed when the appeal was originally taken, and upon the rights of the parties, which may be far more seriously affected than they would have been had the action of the referees now contemplated been taken four years and a half ago. New interests and new improvements may have since grown up and been developed, which may make that quite inexpedient and perchance deeply prejudicial, which originally might have encountered no such obstacles and been attended with no such results. There appears to be an entire absence of any direct authority on this question, and I am left to decide it upon such considerations as seem to me pertinent to the case.

In the case of Woolsey agt. Tompkins, (28 *Wend.* 324,) cited by defendants' counsel, it is indeed held that where judges have filed their final order laying out a highway, they have power afterward to correct any error in the description of the road; but it is put upon the ground that the making up of the certificate is a mere ministerial act, and that in the administration of justice it is a matter of course to amend clerical errors; but in the same case it is said that the reversal of the order of the commissioners is a quasi judicial act, and therefore could not be reviewed or altered by the judges. The power of the referees in this case was a special and limited one. They were to hear and determine the appeal. This they assumed to do when they met and reversed the order of the commissioners.

This exhausted their powers, and the act being "quasi judicial," could not afterward be reviewed or altered by the same body which by its action professed to decide the matter committed to their adjudication, and, by adjourning without day, terminated their existence.

In Jones agt. Crawford (1st *Joh. Cases*, 20) the court say, it is a clear and salutary principle; that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority given them, and can take nothing by implication.

It is safer to hold that the authority given to the defendants was exhausted by the action taken by them under and in pursu-

Welles, executor, &c., agt. Webster.

ance of the authority thus imparted, than to assume that, at any distance of time and under any change of interests, they could revive their abrogated power, and review what was on all sides deemed to be a final adjudication. There is nothing to prevent the institution of new proceedings, when the rights and interests of all parties can be duly represented and legally passed upon.

There must be judgment for plaintiff on the demurrer, with leave to defendants to answer on payment of costs.

SUPREME COURT.

WELLES, Executor, &c., agt. WEBSTER.

It seems, that under the Code, where the plaintiff sues as executor or administrator, it is not necessary to make profert of letters testamentary, or of administration.

If such profert were necessary, the omission to make it is not a ground of demurrer, where the complaint shows the plaintiff is such executor or administrator. The allegation of such fact is sufficient.

Duplicity is no longer a ground of demurrer to a complaint.

Where the complaint alleged that the several sums of money mentioned were received by the defendant upon and for the demands, property and choses in action, which belonged to the testator—held, that the objection, that several causes of action were improperly united, because one of the notes set forth was made payable to the plaintiff individually—not as executor, could not be sustained.

Steuben Circuit and Special Term, May, 1858. Demurrer to complaint.

The complaint alleges that the plaintiff is the executor of the last will and testament of Isaac Webster, deceased, and that he has been duly and legally authorized to act as such executor. It then states that the defendant is indebted to the plaintiff as such executor, on the demands and in the sums of money below specified, together with interest, &c., that is to say:

One note of hand made by the defendant on the 9th of No-

Welles, executor, &c., agt. Webster.

vember, 1834, for seventy dollars, payable to Isaac Webster, or bearer.

One note of hand payable to the plaintiff for \$11,24, and dated the 31st day of May, 1849. One hundred and thirty-seven dollars in cash, received on the Hoover mortgage, January 7, 1845, and so on, setting forth nineteen other items, each varying in amount from eight to two hundred and twenty dollars, and accruing at different times. The complaint then concludes as follows :

“ And the plaintiff says that the above several sums of money were received by the defendant upon and for the demands, property and choses in action, which belonged to the said Isaac Webster, deceased, in his lifetime, and that as such executor, as aforesaid, he has demanded payment and settlement of the same of the said defendant, and that he, the said defendant, has wholly neglected and refused to settle and pay the same. Wherefore, the plaintiff demands judgment, &c.”

The defendant demurs to the complaint, and specifies the following causes of demurrer :

“ 1. The complaint shows that the plaintiff has not legal capacity to sue.

“ 2. The plaintiff has failed to show his right to sue, by omitting to make profert of the letters testamentary, issued to him.

“ 3. That several causes of action have been improperly united in said complaint.

“ 4. That several causes of action have been improperly united in said complaint by putting them all in one count instead of stating said causes of action separately.”

R. B. VAN VALKENBURGH, *for Defendant.*

D. J. SUNDERLIN, *for Plaintiff.*

WELLES, Justice. If it is necessary or proper for a plaintiff who sues as executor or administrator, to make profert of the letters testamentary, or of administration, which, I incline to think, the practice under the Code does not require, the omission to do so is not, in my opinion, a ground of demurrer, pro-

Welles, executor, &c., agt. Webster.

vided the complaint shows the plaintiff is such executor or administrator. It is not among the grounds provided by § 144, for which the defendant may demur to the complaint.

Under the former practice, when such profert was required, it could only be taken advantage of on special demurrer, and when the pleading contained the profert, oyer was rarely in practice given, unless demanded. In the present case the fact that the plaintiff is executor, &c., is distinctly alleged, and that, in my opinion, is sufficient. This disposes of the first and second specifications of causes of demurrer.

The third and fourth specifications are equally unfounded. The most that can be said against the complaint is, that it is double. Duplicity is no longer a ground of demurrer to a complaint. The only remedy of the defendant in such case is by motion to strike out, or that the plaintiff be compelled to elect. I am unable to perceive any objection to uniting the various items mentioned in the complaint in one action; whether they could all be united in one count or statement of a cause of action, is not the question to be considered on the demurrer. It is urged by the defendant's counsel that causes of action due to the plaintiff in his character as executor are united with one due to him in his individual capacity, or in his own right. That one of the items is a note of hand payable to the plaintiff, which shows it is due to him in his own right. But this does not necessarily follow. Indeed, the complaint itself shows the contrary. The note, although to the plaintiff, if given for a debt due to the estate of the testator, could be declared on by the plaintiff formerly, either in his individual or representative character. In this case, the complaint alleges that the several sums of money mentioned were received by the defendant upon and for the demands, property and choses in action, which belonged to the testator. If any portion of the complaint is uncertain or indefinite, so that the charge is not apparent, the court has power on motion to order it to be made definite and certain, by amendment, § 160.

The plaintiff is entitled to judgment on the demurrer, the defendant to have leave to answer on payment of costs.

Davison and others agt. Waring.

SUPREME COURT.

DAVISON agt. WARING.

BENEDICT agt. SAME.

WESTCOTT agt. SAME.

A plaintiff is not entitled to an extra allowance, where the defendant before the plaintiff is entitled to take judgment by default, comes in and confesses judgment, although the proceedings against defendant are by *attachment*.

Albany Special Term, Feb. 1854. Motion for extra allowance.

Warrants of attachments, in each of these causes, and eight others, were issued to the sheriff of Saratoga, by virtue of which the property of the defendant was seized. A few days after, the defendant served upon the plaintiffs' attorneys, in each of the above actions, an offer to allow judgment to be taken against him, pursuant to the 385th section of the Code. The offers having been accepted, the plaintiffs moved for an extra allowance of costs.

POND, LESTER, & BARTLETT, *for Plaintiffs.*

A. BOCKES, *for Defendant.*

HARRIS, Justice. I do not think the plaintiffs present a proper case for an extra allowance. It is true, that it is usual, where the creditor has been obliged to proceed against his debtor by attachment, to make a moderate allowance for the additional trouble attending such proceedings. But where, as in these cases, the defendant, before the plaintiffs are entitled to take judgment by default, comes in and confesses judgment, I think, as a general rule, the plaintiff should not have an extra allowance. In these cases there is no pretence that the proceedings were attended with any more than ordinary labor or difficulty. The motions must, therefore, be denied.

Courter and others agt. McNamara.

SUPREME COURT.

COURTER AND OTHERS, agt. McNAMARA.

Upon an application for an order of arrest or an injunction, the judge to whom the application is made is to require an undertaking on the part of the plaintiff *with or without sureties*, (which means with or without *security*.) (Code, §§ 182, 222.) When the judge, in his discretion, sees fit to require security, it is left to him to satisfy himself in respect to the *sufficiency* of such security; that is, whether the undertaking shall be signed by one or more sureties.

If no security is required, the plaintiff shall justify in the manner prescribed.

The provision of the 184th section of the Code, which requires the sheriff, upon arresting the defendant, to *deliver to him the copy of the order*, is merely *directory*, and the omission to deliver such copy at most would be an irregularity, which might be cured under § 174.

Where, upon an application for an order of arrest, it is charged that the defendant is about to dispose of his property with intent to defraud his creditors, the judge must have legal evidence tending to convict the defendant of such charge before granting the order. The weight and conclusiveness of such evidence is in the discretion, and to be decided by the judge, and his decision, like that of a jury upon the weight of evidence, is *conclusive*.

Albany Special Term, Feb. 1854. Motion to set aside order of arrest.

The affidavit upon which the order was granted, states that the action was brought to recover the amount due upon an account for advances made, and supplies furnished to the defendant, and his laborers, while engaged as a contractor upon the Albany and Susquehanna Railroad; that on the first of February, when the summons in this action was served upon the defendant, he stated that he had \$1050 in his house, but that the plaintiffs should not have a red cent of it, that he intended to leave for California in a few days, and the plaintiffs might whistle for their pay; that it appears from the records in the clerk's office in Albany, that the defendant had, on the 10th of January, executed a mortgage to Bernard Brady, his brother-in-law, to secure the payment of \$1050, payable in six years, and that another mortgage to John Costigan, to secure the payment of \$1000, was recorded on the 17th of January, that two other mortgages, executed by the defendant to Ann Cahill,

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one for \$700, and the other for \$250, appear upon the records, that upon inquiry the mortgaged premises had been found to be worth about \$2000, and that the defendant had no other property to levy amount. Upon these facts and circumstances, it was charged that the defendant had already disposed of a portion of his property with intent to defraud his creditors, and that he was about to dispose of his property with the like intent.

Before the order was made, an undertaking was executed by Alonzo Ferguson, on the part of the plaintiffs, in the form prescribed by law, and the party executing the undertaking made his affidavit to the effect that he was a resident and a householder within the state, and worth double the sum specified in the undertaking, over all his debts and liabilities. It was also duly acknowledged.

Upon the arrest, the sheriff omitted to deliver to the defendant a copy of the order upon which the arrest was made. The defendant moved to set aside the order of arrest upon the ground, 1. That the undertaking was insufficient; 2. That no copy of the order of arrest had been served on the defendant; and, 3. That the affidavit produced before the judge who made the order was insufficient.

L. TREMAIN, *for Plaintiffs.*

L. D. HOLSTEIN, *for Defendant.*

HARRIS, Justice. Upon an appeal to the court of appeals the undertaking must be executed by "at least two sureties." (*Code*, § 334.) When property is to be taken from the defendant and delivered to the plaintiff, an undertaking must be executed by "one or more sureties." (*Code*, § 209.) If the defendant wishes to retain the property, he must give an undertaking, executed "by two or more sufficient sureties." (*Code*, § 211.) If, when the property is claimed by a third person, the plaintiff would still have it delivered to him, he must give an undertaking executed "by two sufficient sureties." (*Code*, § 216.) And so, in every other case in which an undertaking is required, the number of sureties is specified, except when

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application is to be made for a *provisional* remedy. See *Code*, §§ 56, 238, 187, 292, 224, 356. But upon application for an order of arrest, or an injunction, the judge to whom the application is made is to require an undertaking "on the part of the plaintiff, with or without sureties." See *Code*, §§ 182, 222. The matter is thus referred to the discretion of the judge, to determine whether any security shall be required or not. The only restraint upon the exercise of this discretion is, that, if no security is required, the plaintiff shall justify in the manner prescribed. When, in the discharge of his official duty, the judge sees fit to require security, it is left to him to satisfy himself in respect to the sufficiency of such security. Unlike the other cases in which security is to be given, the number of sureties is not prescribed. By the terms "with or without sureties," I understand the legislature to mean with or without *security*, only that, if security is given, it must be security by sureties. The word *surety* is used in the same sense in the 230th section, where it is provided that, upon issuing a warrant of attachment, the judge shall require an undertaking to be executed on the part of the plaintiff, "with sufficient surety." As I understand it, the meaning of this is, that the judge shall require security to be given; but it is left to him to determine upon the sufficiency of that security. If an undertaking executed by one surety is deemed sufficient, the law is satisfied. If more are required, more must be given. So, in case of the order for arrest, the judge may not require security at all; but, if he does, he is to determine upon the sufficiency of the security. It may be one or more sureties. The only restriction upon his discretion, if security is required at all, is, that the form of the security shall be by the execution of an undertaking by one or more sureties. This, I think, is all that the provisions of the sections in question contemplate. If so, it follows that there was no irregularity in granting the order of arrest upon an undertaking executed by one surety.

Nor should the order of arrest be set aside because the sheriff omitted, when he made the arrest, to deliver to the defendant a copy of the order. Even if the *arrest* itself was rendered illegal by the omission, the *order* was not affected by it. But

I think the provision of the 184th section of the Code, which requires the sheriff, upon arresting the defendant, to deliver to him a copy of the order, is merely directory, and the omission, at most, would be an irregularity; such an irregularity, too, as might be cured under the provision of the 174th section of the Code, which declares that "whenever *any proceeding* taken by a party fails to conform in any respect to the provisions of the Code, the court may, in its discretion and upon such terms as may be just, permit an amendment of such proceedings, so as to make it conformable thereto."

The only other question is, whether the facts stated in the affidavit were sufficient to authorize the judge to make the order. The charge was, that the defendant was about to dispose of his property with intent to defraud his creditors. To sustain the order, there must have been before the judge, when he granted it, legal evidence tending to convict the defendant of this charge. It was for him to judge of the weight and conclusiveness of that evidence. His decision, like that of a jury upon the weight of evidence, is conclusive. No other judge, though he might differ from him in respect to his conclusion, has the legal right to pronounce the order void.

In this case, the defendant having encumbered all his visible property to its full value, and that, too, under circumstances calculated, to say the least, to justify the suspicion that he had not acted in good faith, declared his purpose of going to California, and set the plaintiffs at defiance. He admitted that he had money, to the amount of \$1,050, but declared that the plaintiffs should not have a cent of it. The facts positively stated were sufficient, I think, to warrant the judge in finding that the defendant was about to leave the state, and that he intended to take his property, consisting of the money in his possession, with him; and that it was his design thus to remove himself and his property beyond the jurisdiction of the courts of this state, so that he should not be compelled to apply his money to the payment of his debts. If so, he rendered himself liable to arrest, and the order was properly granted. The motion must, therefore, be denied, but without costs.

Fisher agt. Hall and others.

SUPREME COURT.

FISHER agt. HALL AND OTHERS. (*Original bill.*)CLARK AND OTHERS agt. THE SAME. (*Bill of revivor and supplement.*)

COSTS.—Where a plaintiff in an equity suit claims, by bill of revivor and supplement, the same relief as was claimed by the plaintiff in the original bill, on motion for leave to discontinue, he must pay the costs of *both suits* from the beginning.

This suit, although commenced in the former court of chancery, and the bills of costs taxed under the chancery fee bill, may nevertheless, in some of its principles, apply to costs claimed under the Code.

Washington Special Term, Sept. 1853. This is an application for leave to discontinue on payment of the costs of the last suit. Henry Fisher filed the original bill, claiming certain relief in relation to lot 42 in the iron ore tract in Moriah, and the possession thereof. The defendants answered, and the cause was put at issue by replications. No testimony was taken in the cause; but on the 3d of April, 1847, the deposition of William H. Meacham, as a witness for the defendants, was taken, *de bene esse*, under an order previously granted by the court. The bill was filed in 1845 in the court of chancery. Before any further proceedings were had in the cause, and on the 13th of May, 1847, Fisher, the complainant, died, having, previous to his death, conveyed his interest in the lot to Byron Pond, who conveyed the same, on the 16th November, 1846, to Calvin Fisher and Hiram M. Storrs, in trust to pay the rents and profits to complainant during his life, or until he should appoint some person to receive a conveyance of the lot, or to whom he should devise it by his last will and testament. Complainant, by his will, devised one-half the lot to his son Austin, and the other half to his son Calvin. The trustees, after the death of complainant, conveyed one-half to Austin and one-half to Calvin. Austin and Calvin conveyed all their shares except thirteen acres to Charles Miller, who afterward conveyed to defendant Clark, who conveyed two undivided third parts to the other defendants. Under these circumstances they filed their bill of revivor

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and supplement in supreme court on the 15th January, 1848, claiming the relief, as subsequent grantees, which the complainant claimed in and by the original bill. An answer was put in. Replications filed about the 28th of August, 1851. No testimony was taken in either cause, except that of Meacham, as before stated. The cause was never noticed for hearing by either party. The court is to tax the bills of costs presented with the papers in conformity with the decision of the motion.

W. POND, *for Plaintiffs.*

G. A. SIMMONS, *for Defendants.*

C. L. ALLEN, Justice. I have no doubt but that the defendants are entitled to their costs of both suits. The plaintiffs claim title to lot 42, as grantees through several grants and the devise under the will of Henry Fisher; and ask, by their bill of revivor and supplement, the same relief as was claimed by Fisher under the original bill. I understand the rule in equity to be, that in a bill of revivor and supplement the plaintiff must pay the costs from the beginning. If the interest of a party is undetermined and transferred to another, the relief is obtained by supplemental bill, and the new party comes before the court in the same plight and condition as the original complainant. He is bound by his acts, and may be subject to the costs from the commencement of the proceedings in the original suit.

So a purchaser, *pendente lite*, on filing a supplemental bill, is liable to all the costs from the filing the original bill.

Suppose, says Hoffman, an estate has been in controversy in this court for twenty years, and during suit the claim in controversy is purchased; the purchaser, on filing supplemental bill, comes into court, *pro bono et malo*. He shall be liable to all costs from beginning to end. (1 *Hoff. Pr.* 401; *see Atk.* 88, 89; 11 *Paige*, 221; 1 *Barb. Ch. Pr.* 585; 2 *Paige*, 459; 11 *J. R.* 490.) At law the party in interest, though not a party on the record, is liable to pay the costs. (7 *Wend.* 497; 20 *Wend.* 622.) I shall accordingly allow the defendants the costs in both suits. Plaintiffs might perhaps have filed a new bill, and thus avoided the costs of the first suit, but

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they have chosen a different course, and must abide by its consequences. Several items in the original bill are objected to, and I shall proceed to notice them in their order. The copies of affidavits, charged as engrossing at fourteen cents per folio, at No. 23, were, it is true, not necessary on motion, but they were to be filed on the decision of the motion, and I think fees for engrossing are allowable. Copy to keep, also charged at seven cents, at No. 25, is also allowable if actually made, and the solicitor swears in this case it was. The items marked No. 1, 2, and 3, on the 2d page of the bill, are objected to on the ground that the motion was made on the original papers, and that there was no necessity for making copies. The solicitor swears that they were actually made. The chancellor decided, in Mann agt. Rice, (3 Barb. Ch. R. 42, 44,) that the charge for a copy of answer to be used on a motion of this kind was *not allowable*; for the extra copy of the answer, which is always allowed to the party to keep, should be used in all cases where it is necessary to exhibit a copy to the court, upon the making or opposing of a motion. This remark does not apply, however, to the copy of the bill and injunction which were allowed, and which it was necessary the defendants should copy and furnish to the court on the motion. I shall therefore strike from the bill the amount charged for copies of answer and affidavits, and allow the two remaining items. There is no provision in the fee bill allowing for copy of opinion, and the fee of 50 cents charged for that item must be stricken out. The charge for certified copy of order dissolving injunction for master, is not allowable, as not necessary; but I rather think the charge is intended to be for copy order to examine Meacham, as no such charge, which would be proper, can elsewhere be found. I shall therefore allow it to stand.

The charges relative to the examination of Meacham I shall allow, as it appears the witness was examined under an order of the court, which was regular until it was set aside.

The item, No. 5, on the 3d page of the bill, is objected to, all but three copies, on the ground that there was no need of serving order on any but the grantees of Fisher. The so-

Potter agt. Smith.

licitor says the order directed a copy to be served on all the defendants, and swears the copies were all made and served. I shall therefore allow them. So of the items for affidavits, of service of the copies of order and the admission of the same on Mr. Pond, having all been actually made and done, are allowable; and also of the items from No. 13 to 81, for order, and service of copies modifying injunction. The three last items are also allowable. This disposes of the objections to the original bill, and I tax it, deducting \$13,66, at \$153,02.

As to the costs of the supplemental bill, the solicitor for plaintiffs objects to the two items of brief and solicitor and counsel fee on hearing, and swears that the cause was never on the calendar, or if it was, it was irregular and not noticed. These two items must therefore be stricken out; but the remaining items are allowable if the services were done, and the solicitor swears they were. The charges also are allowable. Defendants have a right to judgment of discontinuance, and to have their costs entered therein. The bill is therefore taxed in this case, deducting \$15,00, at \$48,98.

SUPREME COURT.

POTTER agt. SMITH.

Where, in an action for account, the defendant in his answer claims a specified sum, as a *set off*, the plaintiff, without a reply, can not notice the cause at the circuit, and take an inquest for his *whole claim*. The reason is, that the set off interposed by the defendant is *new matter*, constituting a *counter claim*, which, if not *replied* to by the plaintiff, is *admitted* by the pleadings, and can not be disregarded on the inquest.

Besides, if the defendant has no other defence, he can not make an affidavit of merits and go to trial, because his only defence is admitted.

Although it is irregular for the clerk to insert in the entry of judgment the plaintiff's costs, without notice of taxation, where the defendant has appeared, yet that will not affect the entry of judgment, if notice of retaxation be given, and the entry of judgment corrected, (if any correction is necessary,) in conformity to such retaxation. (*This agrees with the case of Stimson agt. Hug-*

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gins, ante, p. 86; see also 4 How. Pr. R. 414; 5 id. 234; 7 id. 490; 2 Code R. 49; 1 Code R. N. S. 197; and 4 Sand. S. C. R. 684.)

Albany Special Term, January, 1854. Motion to set aside judgment.

The action was brought to recover a balance alleged to be due upon the settlement of accounts between the parties. The plaintiff demanded judgment for \$114,10, with interest. The defendant, in his answer, among other defences, claimed a set off of \$40, which he alleged the plaintiff had agreed to allow. The plaintiff did not reply to the answer. The cause was noticed for trial at the Schoharie Circuit, in November, 1853. No affidavit of merits was served, and the plaintiff's attorney moved the case as an inquest, and took a judgment for the amount claimed in his complaint, with interest, being \$117,83. On the same day he procured his costs to be taxed by the clerk at \$38,27, and perfected a judgment for \$155,60; and caused a transcript to be filed in Albany county. No notice of the adjustment of the costs, or of a readjustment was given. The defendant moved to set aside the judgment and subsequent proceedings, on the grounds, 1. That the set off was not allowed; and, 2. That no notice of the adjustment of costs had been given.

D. K. OLNEY, *for Plaintiff.*

L. TREMAIN, *for Defendant.*

HARRIS, Justice. The answer contained new matter, constituting a counter claim, to the amount of \$40. If the plaintiff had intended to controvert this claim, he should have done so by a reply, as provided by the 158d section of the Code. Not having done this, the set off was admitted by the pleadings, and could not have been disputed upon the trial. If this was the only defence upon which the defendant relied, he could not, in this state of the pleadings, have made an affidavit of merits. The plaintiff, upon the inquest, was bound to allow the set off, as it stood admitted upon the record. It was irregular for him to disregard it, and take a judgment for the amount claimed in his complaint.

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It was also irregular for the clerk to insert in the entry of judgment the plaintiff's costs, without notice of taxation. But I do not understand that, because this entry was irregular, it must necessarily be stricken out. There is no reason why, if after such entry the costs are retaxed upon notice, and the amount is not reduced, the entry should be stricken out, when the plaintiff would have the right to have the same amount of costs reinserted. Nor can I see why, even where, upon the re-taxation of the costs, the amount has been reduced, any thing more should be done than to correct the entry by inserting the true amount of costs. By the 174th section of the Code, it is provided that "whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the court may, in its discretion, and upon such terms as may be just, permit an amendment of such proceedings so as to make it conformable thereto." In this provision I think ample authority may be found for correcting the entry of costs, so as to make it conformable to the amount ascertained upon a proper taxation, and even for allowing the irregular entry to stand, if the party recovering judgment will stipulate to deduct from the judgment the amount which, upon the taxation of the costs, may be deducted therefrom. The party against whom costs are recovered will then have all the advantage which it was intended he should have, by securing him a notice of the adjustment of the costs. Convenience as well as justice, I think, are on the side of this practice. See *Coldsmith agt. Morse*, 2 Code Ref. 49; *Dix agt. Palmer*, 5 How. 233; *Mitchell agt. Hall*, 7 How. 490; *Gilmartin agt. Smith*, 4 Sand. 684. In the latter case Mr. Justice Bosworth has been very successful in showing that the irregularity of entering in the judgment the amount of costs, without notice of adjustment, affects only the entry, and not the judgment itself, as had been held in some early cases to which he refers. Whether that learned judge would have insisted on vacating the entry of costs altogether, or merely correcting it, so as to make it conform to the true amount of the costs, as the same should be ascertained upon regular taxation, does not appear. The judgment, in the case before him, was vacated upon

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other grounds. So, in Mitchell agt. Hall, Mr. Justice BARCULO directed the *ex parte* adjustment of costs to be set aside, and granted the party applying such other relief as his case required; but it does not appear that the judgment, or even the entry of costs in the judgment, were set aside. In Dix agt. Palmer the judgment had been entered and the costs inserted, without notice of adjustment. Subsequently notice of adjustment was given; but the party upon whom such notice was served did not appear, to have the costs readjusted. It was held that the notice of readjustment cured the irregularity, and a motion to set aside the judgment was denied, with costs. Tracy agt. Humphrey (1 *Code Rep. N. S.* 197) is to the same effect. In that case, as in this, no notice of adjustment had been given. A motion to set aside the judgment for irregularity in adjusting the costs was denied, but the court directed that, before proceeding to enforce his judgment, the plaintiff should have his costs readjusted upon notice, and should deduct from the execution the amount which should be deducted from the costs. It was further ordered that the record and docket of judgment should be amended, if any deduction should be made on the readjustment of the costs. I think this should now be regarded as the settled practice of this court.

The motion to set aside the judgment must be granted, unless within ten days after notice of this decision the plaintiff shall stipulate to deduct from his judgment \$40, for the amount of the counterclaim which was not allowed upon taking the inquest, and \$2, which appears from the items of the costs presented on the motion to have been overcharged for witnesses' fees, and \$10 for the costs of this motion.

Rusher and wife agt. Morris and wife.

SUPREME COURT.

RUSHER AND WIFE agt. MORRIS AND WIFE.

Where a suit is brought by a married woman, concerning her separate property, her husband must be joined with her, unless she elects to sue alone.

Whether a married woman is under an improper control or restraint of her husband in reference to suits affecting her separate property, may be inquired into. And this may be done, in analogy to the law regulating the proof of the execution of conveyances, by her examination separate and apart from her husband. And the examination may be at her own instance, or at the instance of the defendants, or on the mere motion of the court itself.

If, upon inquiry, it should appear that the suit was instituted against her wishes, a discontinuance could be compelled.

But if she chooses to associate her husband with her in the prosecution of such actions, she does but exercise a right which, if not possessed before, the law of 1848 and the Code have given her.

New-York Special Term, April, 1854. Married woman's rights, &c.

This was an action brought by the plaintiffs on the 23d day of January, 1854, to foreclose a mortgage made the 29th day of June, 1853, for the sum of three thousand one hundred dollars, executed to Mary Ann C. Rusher, wife of John B. Rusher, one of the plaintiffs. The defendants demurred to the complaint in the following words:

"The defendants, Peter Morris and wife, demur to the complaint of the plaintiffs in this action, for that there is a defect of parties plaintiff therein."

D. T. EASTON, *for Plaintiffs.*

W. McDERMOTT, *for Defendants.*

ROOSEVELT, Justice. The defendants insist, by demurrer, that although Mrs. Rusher has a right, Mr. Rusher has none, to sue on a bond and mortgage given to her alone, since the act of 1848. That husbands have no longer any interest in the "actions" of their wives, and that, for the future, in respect of their own property, are to be treated precisely as if, in the language of the day, they were "single females."

A married woman's property, including of course her bonds

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and mortgages, is now, it is true, "sole and separate estate," and not "subject (any longer) to the disposal of her husband, nor liable for his debts."

The new law, dispensing with the usual special conveyancing in each particular case, has made a general marriage settlement for all. But has it gone so far as, in effect, in matters of property, to establish an entire separation between man and wife? Has it made it unlawful to join him with her when she is seeking to recover her property; and must she, in all such cases, whether she desire it or not, choose some third person to be her "next friend," in his stead?

The new Code of Procedure, and the new married woman's rights' act, were both in course of preparation at the same time and in the same legislature; but by different and independent hands, not acting in concert. And therefore, although necessary, as it certainly is, it may be difficult to harmonize their provisions.

For the mere fact that the date of the final passage of the Code, April 12th, 1848, is five days later than that of the other statute, can furnish no ground, under the circumstances, for inferring an intention to repeal any of the provisions of the latter.

Now the Code, treating of civil actions, lays down this broad general rule, that "when a married woman is a party, her husband *must* be joined with her;" thus recognizing at once both his duties and his rights. Certain exceptions, however, of obvious necessity or propriety, are annexed to the rule; namely, divorce and actions "concerning her separate property."

In the former, from the nature of things, she *must*; in the latter, she "*may*, sue alone."

In the former, as husband, he being against her, "can not be joined with her." "She must sue by her next friend." In the latter, he not only may, but "must be joined," unless she elects, as she may, "to sue alone." (*Code*, § 114.)

There is nothing illegal, therefore, in the husband's becoming a coplaintiff in this suit. But as the wife had an undoubted right, which at times may be of great importance to the better protection of her interests, to sue without him, it is the duty

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of the court to guard her in its exercise ; and the question is, how is that to be done ? How is she to be guarded against the possible consequences of suits brought, perhaps without her knowledge or consent, in the joint names of both, but really under the separate control of the husband alone ?

When a wife joins with her husband in a conveyance of real estate, the law provides, as the proof of exemption from undue marital control, that she shall make an acknowledgment before the proper officer that she does the act freely ; and his certificate to that effect is made legal evidence of the validity of the deed.

I see no difficulty, in the observance of positive rule, in introducing a similar practice in these cases.

Indeed, it is but following a well-established course, never abolished, by the late court of chancery. And the principle is also, in effect, recognized by the amendment made in 1849 to the married woman's act, which places even trust property under the direct control of the wife, and annuls the trustees, in all cases of "a certificate (duly obtained) of a justice of a supreme court, that he has examined and made inquiry" into the situation, capacity, &c., of the married woman, and is satisfied with the result.

The sole ground on which the defendants place their demurrer is the alleged "*defect* of parties," whereas, according to the argument presented at the hearing, the real objection to the complaint is a supposed *excess* of parties ; one of them, the husband, having, as is contended, no interest in the cause of action. The oral argument, it will thus be seen, overrules the written demurrer. But there is in fact neither excess nor defect. Husbands, notwithstanding the act of 1848, have an interest, as against strangers, in enforcing the rights of their wives. Although deprived of the power of "disposal," they are not exonerated or deprived of the duty and the right, at their wives' instance, of protecting their wives' property.

The complaint, in the present case, prays, it is true, that the mortgage money, when received, may be paid to both. But the court is authorized to adapt its relief, not to that merely

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which is asked for, but to that which is just; and, should the wife not make the required acknowledgment of her wishes on the subject, the court can decree the payment to be to her separately, or to her sole and separate use.

At all events, I am not disposed to adopt either as a consequence of the Code or of the act for the better protection of their rights, the harsh proposition that married women must be turned out of court merely because they come in arm in arm with their husbands!

Whether the married woman is under restraint or not may be inquired into. She may be examined as to her wishes, separate and apart from her husband. She may be so examined at her own instance, or at the instance of the defendants, or on the mere motion of the court itself. And if, upon inquiry, it should appear that the suit was instituted against her wishes, a discontinuance could be compelled. But if she chooses, as in most instances she well may, to associate her husband with her in the prosecution of her rights, she does but exercise a right which, if not possessed before, the law of 1848 and the Code itself have given her.

The demurrer, therefore, must be overruled, and judgment of foreclosure and sale entered, with costs and an allowance of three per cent.; and with directions to pay the mortgage money, when raised, direct to the wife, unless she shall give a written consent, duly acknowledged before, and certified by, one of the justices of this court, to pay the same to her husband or some other person in her behalf.

SUPREME COURT.

MOIR AND NORTON agt. BROWN, Sheriff, &c.

NORTON agt. SAME.

An attorney is liable for costs in cases of non-resident plaintiffs, only where security for costs could be *originally required*.

Therefore, in order to compel payment of costs by the attorney in the action, it must appear *affirmatively*, that the plaintiff was a non-resident *when the action was commenced*.

Saratoga Special Term, Jan. 1858. This was an application for an order that Marcus Ball, Esq., the attorney for the plaintiffs in each of the above actions, pay to the attorney for the defendant, the sum of \$18.72, in each action, costs of the last Warren circuit, ordered to be paid on putting off the trial, on motion of the plaintiffs' attorney.

It does not appear when the actions were commenced; but the affidavit of the attorney for the plaintiffs states, that they are actions of replevin, that by an agreement with the attorney for the defendant, the defendant waived a return of the personal property, to recover which the actions were brought, and the plaintiffs gave to the defendant at the time of the taking of the property from the defendant, the usual undertakings conditioned for a return thereof, if a return be adjudged, and for the payment to the defendant of any sum *he might for any cause recover* against the plaintiffs, which undertakings were at the commencement of the actions submitted to and approved by defendant's attorney. That the sureties in the undertakings are worth \$50,000, and the value of the property taken \$500. The actions were noticed for trial at the last circuit in Warren county, and were put off by the plaintiffs,—the attorney being detained from attending court by severe illness and death in his family. The orders putting off the trials directed that the plaintiffs in each cause pay to the defendant's attorney \$18.72 in each action in twenty days after service of a copy of each order on the plaintiffs' attorney.

The attorney for the defendant caused the order to be served,

Moir and Norton agt. Brown, Sheriff, &c.

and an additional note afterward requesting the costs to be paid, but has not received them. On an affidavit that he is informed and believes that the plaintiffs in both and each of the actions *are non-residents of the state of New-York*, that they *reside* in the state of Ohio, that there is no property, real or personal, in this state, belonging to them or either of them, by which the costs can be collected on process, the attorney for the defendant now moves for an order that the attorney for the plaintiff be required to pay them.

H. R. WING, *for Motion.*

W. A. BEACH, *Contra.*

C. L. ALLEN, Justice. Under the rule of the court of 14th January, 1799, attorneys were made liable for costs to the amount of \$100, where the plaintiff was a non-resident at the time of the commencement of the suit, or became such during its pendency, unless security for costs was filed. By the Revised Statutes of 1830, the liability of the attorney seems to be confined to cases where the plaintiff does not reside in the state, when the suit is commenced. BRONSON, Ch. J., says in *Alexander agt. Carpenter*, (3 *Denio*, 266,) that the legislature thought the old rule too hard upon the lawyers, and it was provided that the attorney should not be liable in cases where the plaintiff removed out of the state after the suit was commenced. After the revision, the rule was abolished, and since 1830 there has been no law or rule of the court making the attorney liable, except under the 2 *R. S.* § 7, which declares that attorneys can only be made liable in those cases where security could *originally be required*.

The papers in this case do not show that the plaintiffs were non-residents of the state when the actions were *commenced*. The attorney swears, that he is informed and believes, that they *are* non-residents, and that they reside in the state of Ohio. They may have resided here at the time of the commencement of the suits, and removed to Ohio since. The party should show *affirmatively* in his affidavit the facts which entitle him

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to the relief for which he moves. Constantine agt. Van Winkle. (2 *How.* 273, and other cases.)

This conclusion disposes of the motion. There are other grounds taken in opposition, and among them, that this action being in the nature of replevin, and the requisite undertakings under § 209 of the Code having been executed, that the defendant could not require security for costs, and that the attorney can only be made liable where such security can be required. It is very questionable whether the remedy of the defendant in this case is by motion against the attorney. (9 *Wend.* 462; 4 *How.* 93.)

I do not, however, pass upon that question, but shall deny the motion without prejudice, that the defendant may renew it on additional papers, if he shall be so advised.

Motion denied, with \$7 costs.

SUPREME COURT.

LEE AND OTHERS agt. STANLEY.

Where it appeared that the defendant at the time of issuing the attachment against him, kept a house in Bradford, New-Hampshire, in which his wife and children lived, and in which he entertained his friends, and which was frequently called by him "his home,"—*held*, that such place was the legal residence and *domicil* of the defendant, notwithstanding the positive statement of the defendant that he had since the spring of 1852, and then had a store of goods, and was doing business as a merchant, and had actually resided in Franklin Co., in this state, with the honest intention of making the latter place his permanent residence.

New-York Special Term, Feb. 1854. Motion to set aside attachment.

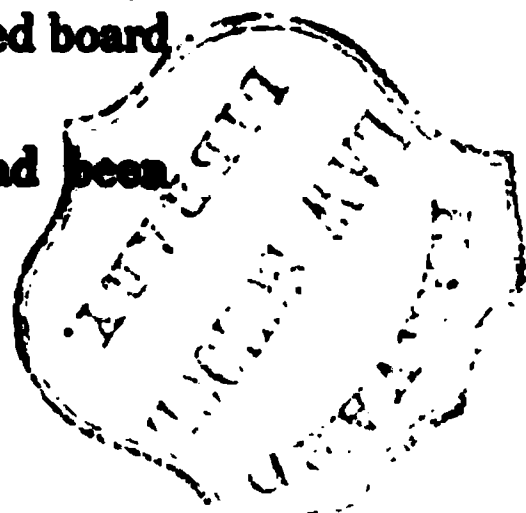
The attachment was issued against the defendant upon an allegation that he was a non-resident. The defendant showed by his own affidavit that he formerly resided and did business in Lynn, Massachusetts; that in the winter of 1846-7, he broke

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up keeping house, and his wife went to live with her mother in Bradford, New-Hampshire; he remained in Lynn until February, 1849, when he went to California, leaving no property or business in Lynn. In September, 1850, he returned from California, and went to Bradford aforesaid, and remained there and in Massachusetts and Maine, without any permanent business, until the spring of 1852, when he went to Hogansburgh, Franklin Co., N. Y., and bought a store of goods, hired a store, and commenced business as a merchant, with the actual and honest intention of making that place his residence and home; and had actually resided there until July, 1858, when he sold out his business. But previously, in April, 1853, he had made arrangements to establish himself in business at Moria in said county of Franklin, and agreed for the building of a store, to be leased to him for five or ten years; that he continued his business at Moria until the commencement of this action.

That when he came to Hogansburgh in the spring of 1852, he left no business or property in Massachusetts, New-Hampshire, or elsewhere in New-England, and actually abandoned all thought or intention of returning there to reside or do business. That his wife and only child remained with her mother in Bradford, until October, 1852, when they came to Hogansburgh with the intention of remaining permanently with defendant. Before they came, he had agreed to hire a house in the latter place with the intention of keeping house, but before their arrival, the owner of the house moved in and occupied it himself; and he was then unable to procure any other. His wife remained at Hogansburgh until the last of February, 1858, when he being unable to hire a house, and his wife being about to be confined, he allowed her to return to her mother's, in Bradford aforesaid; that he intended to have his wife return to Franklin county, and she would have so returned but for the breaking up of his business by this and other attachments. That he had endeavored to hire a house to go to house-keeping at Moria, but none was to be had, and he had engaged board for himself and family at a hotel there.

That for more than eighteen months last past, it had been



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actually and in good faith his intention to reside and do business permanently at Hogansburgh or Moria, in the county of Franklin, N. Y.; and that during all that time he had been, and then was a resident in the said county of Franklin, and not elsewhere.

The affidavit of Wm. W. Barnard stated, that he went into the employment of defendant, as a clerk on the 15th of February, 1853, and remained with defendant at Hogansburgh about two months, when he went to Moria and took charge of defendant's business at that place, where he remained up to the time of the commencement of this action; that he was acquainted with the business and plans of the defendant: and believed the statement in the affidavit of the defendant to be correct. That from the time he first went into the employment of said defendant, the latter uniformly declared it to be his intention to reside and do business permanently at Hogansburgh, or Moria; and all his arrangements seemed to be in accordance with such intention. He knew that the family of defendant were at Hogansburgh in the winter of 1853, and understood that they left for the cause stated in defendant's affidavit. He learned from both the defendant and Alfred Fulton, that defendant had engaged a dwelling-house of said Fulton, as stated by defendant in his affidavit. He also personally knew of the agreement of said Stanley to hire a store at Moria for a term of years.

On the part of the plaintiffs, it appeared, from the affidavit of J. W. Kimball, that about the 1st of November, 1853, he met defendant in the city of New-York and had a conversation with him relative to his place of residence or home, and defendant informed him that "it was where night overtook him," and then informed him that defendant's wife was at some place in New-England, not recollected, and that defendant was then going to see her and his children before he returned, and that he was then going to Boston. Had heard defendant say that he had a store, and was doing business at Williamstown, Canada.

John S. Eldridge, of Hogansburgh, stated that he had been

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acquainted with defendant since the spring of 1852; that he owned the store occupied by defendant at the place aforesaid; that defendant occupied it, he considered, as a tenant at will; that he had repeatedly heard defendant say that "he was going home to see his wife," and after being absent a few days, would say he "had been home;" that the last winter (1853) defendant had a store at Williamstown, Canada West, and according to defendant's statements, was doing a large business there; that defendant spent most of his time between Hogansburgh and Williamstown, until he established a store at Moria, after which he divided his time between the three places,—except when East. Had heard defendant say he had no right to vote in Hogansburgh, or did not consider himself a voter there. Has heard defendant say that his wife was keeping house at some place in New-Hampshire.

Myron Hitchcock, of Cornwall, Canada West, stated that he had had repeated business transactions and frequent conversations with defendant since the spring of 1852; that defendant had told him that his wife was keeping house in New-Hampshire, and that his wife's mother lived with his wife; that the past summer defendant informed him "he had been home and had seen the baby;" he said to defendant that he supposed defendant would bring her back again, that defendant said, "he did not know as he should, that he had a good home or house for her there, and every thing comfortable for her, and she preferred to be there;" that he had no settled place here, and he was a part of the time here and a part of the time in Canada, and that he made it his home "where night overtook him;" that defendant kept a store at Williamstown, Canada West; that he had heard defendant say that Hogansburgh was a mere deposit for his goods, and that he sold most of his goods in Canada; that at one time defendant invited him to go to New-York by way of defendant's house, said he had a good house and every thing comfortable about it, and lived in good fashion; that defendant told him in the winter of 1853, that "his wife had been up here, (Hogansburgh meaning,) on a visit."

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Buel J. Hitchcock, of Cornwall, Canada West, stated, that he had repeatedly, during the summer of 1853, heard defendant say that he had "a nice, cozy place down home in New-Hampshire, and that he had a wife and family there, keeping house;" that in the fall of 1853, defendant told him that defendant and John O. Bridges had been down home, and that they had had a nice time, &c. Had frequently heard defendant remark in substance, that he had been down home, or was going down home; and during the summer of 1853, defendant informed him, in answer to an inquiry, that defendant's wife was up here last winter and made a long visit.

John O. Bridges, late of Hogansburgh, then of Massena, St. Lawrence Co., stated that defendant had repeatedly told him that defendant's wife was keeping house in New-Hampshire, and that her mother lived with her; that defendant frequently called the place where his wife kept house "his place," and frequently spoke of "going home," and after having been absent, would say, "he had been home," or "had been down home." That in September, 1853, defendant invited him "to go home with him," and that in accordance with such invitation he went with defendant to Bradford, New-Hampshire, that on their arrival, defendant invited him to go to "his house," and he accordingly went, and found there Mrs. Stanley and children, and that, to all appearance, Mrs. Stanley appeared to be mistress of the house, her mother being an aged and infirm woman, unable to get about the house. During the summer, (1853,) saw defendant putting up a box of articles, which defendant said he was going to send "home." While at Bradford, as aforesaid, defendant showed him what defendant had done toward repairing and moving the buildings, that it cost defendant \$150, and said he must, or designed to keep the place.

Alfred Fulton, of Hogansburgh, corroborated the statements before given, respecting the assertions made by defendant respecting his going home, (to Bradford,) or his having been home to see his wife, &c. That in the fall of 1853, defendant spoke to him about hiring a house at Hogansburgh, which was then

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vacant, that he informed defendant he could have the house, but defendant did not conclude any bargain; that soon after defendant's wife came to Hogansburgh and boarded for a few months at Mrs. Taylor's Hotel; that some time in the winter, defendant again endeavored to engage said house for the use of W. W. Barnard, who was then in defendant's employ, but did not engage it, as defendant had not accepted his terms in the fall previous, and he had promised said house to another person. Had during the fall of 1852, and winter of 1853, heard defendant on divers occasions say that he had a store in Williamstown, Canada West, and that he was doing more business there than at Hogansburgh; defendant was back and forth at Williamstown and Hogansburgh.

E. W. & G. F. CHESTER, *for Plaintiffs.*

CHARLES TRACY, *for Defendant.*

CLERKE, Justice. Notwithstanding the very positive statements contained in the affidavits in support of this motion, I think the plaintiffs have sufficiently proved that, at the time the attachment was issued, the *domicil* of the defendant was at Bradford, New-Hampshire. The papers read on this motion satisfactorily show, that he there kept a house, in which his wife and children lived, and in which he entertained his friends and exercised the domestic rights and duties.

Now as a man can have only one domicil, and as I entirely concur with Justice PAIGE in his able opinion in Crawford agt. Wilson, (4 Barb. 504,) that the terms legal *residence* or *inhabitaney* and *domicil* mean the same thing, (with a few exceptions, not comprising this case,) I cannot avoid the conclusion, that the defendant was a non-resident at the commencement of this action. His being engaged in business in Franklin County, in this state, as a store-keeper, had no greater effect in making him a resident here, than a similar occupation in Williamstown, Canada, made him a legal resident of that place. He probably intended to remove his domicil at some future time from Bradford to this state, and he might have made the effort on a former occasion to do so; but he never put that intention into

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execution by abandoning his domicile in New-Hampshire, and establishing one in this state.

For these reasons I dismiss the order to show cause why the attachment should not be set aside, with \$10 costs.

SUPREME COURT.

SLEIGHT agt. READ AND OTHERS.

On a foreclosure, the surplus moneys brought into court are subject to its jurisdiction as a court of equity.

A judgment creditor of the *husband*, where the wife claims as heir, has no lien upon the surplus, even where the marriage took place and the debt was incurred prior to the laws of 1848 and 1849, establishing the rights of married women.

It seems that the law of 1848 applies to after-acquired property.

New-York Special Term, April, 1854. Rights of married women.

Catharine Bishop, one of the defendants, claimed to be paid to her out of the surplus moneys in this action, one equal third part of the whole amount, subject only to the dower of Eunice Read, the widow of Cornelius Read, the mortgagor. That such claim was made as one of the three children and only heirs-at-law of the said Cornelius Read.

Mary Elizabeth Alexander, also one of the children and heirs-at-law of said Cornelius Read, made a like claim.

On the 6th January, 1854, a referee was appointed to ascertain the lien of John B. Vail and any other liens, and their priorities, upon the surplus funds brought into court in this action.

On the 15th February, 1854, the referee made his report, by which he found that Cornelius Read, the mortgagor, died intestate and seized in fee simple of the mortgaged premises, on the 30th April, 1849, leaving him surviving his widow, the defendant Eunice Read, and three children, namely: his two daughters, the defendants, Catharine, wife of the defendant Joseph Bishop, and Mary Elizabeth, wife of the defendant John

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Alexander, and a son, John Read, and no other heirs or next of kin. The children were all of full age at the death of their father : that the marriages of the daughters were prior to 1847 : that Bishop and his wife had issue living : that Alexander and his wife never had any issue : that John B. Vail recovered judgment in this court against said Alexander, which was docketed on the 17th November, 1848, for the sum of \$549,37 ; and that said Vail recovered judgment in the superior court against said Bishop, which was docketed on the 16th April, 1849, for the sum of \$380,79—both of which judgments were a lien upon the said surplus moneys: that the judgment against Alexander was rendered for a debt contracted in the month of January, 1848, and that the judgment against Bishop was rendered for a debt contracted prior to the month of November, 1847 : that the last-mentioned judgment was to the extent of \$200 collateral to the first-mentioned judgment: that said John B. Vail sold and assigned the said two judgments to Henry Whinfield, on the 9th January, 1850, who was then the owner of them, and that both the said judgments are wholly unsatisfied.

That Catharine, the wife of Joseph Bishop, and Mary E., the wife of John Alexander, were each entitled to the sum of \$611,01, subject in Mrs. Bishop's share to the tenancy by the courtesy of her husband—and subject, in Mrs. Alexander's share, to the life estate of her husband, during the joint lives of herself and her said husband.

That said Henry Whinfield, by virtue of the aforesaid judgment against Joseph Bishop, was entitled to the income of the said share of Catharine Bishop during the life of the said Joseph Bishop ; and that, by virtue of the judgment against John Alexander, said Whinfield was entitled to the income of the said share of Mary E. Alexander during the joint lives of herself and husband, until, by the application of the annual income of the said respective shares toward and upon the said judgments, with the interest thereon from their dates respectively, less the sum of \$200 and interest from the judgment against said Bishop, they were paid in full.

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The report also disposed of the share of the widow, Eunice Read, and of the son, John Read.

Exceptions to the report were taken on behalf of said Catharine Bishop and Mary E. Alexander.

BELL & COE, *Counsel for Mrs. Bishop and Alexander.*

J. D. & T. D. SHERWOOD, *Counsel for creditor, Whinfield.*

ROOSEVELT, Justice. Is the judgment creditor of the husband, since the acts of 1848 and 1849, entitled to take the whole of the income of the wife's property, leaving the wife, for the proposition goes that length, to starve?

The marriages in this case, it is admitted, had taken place, and the debts been incurred, before the acts for the better protection of the rights of married women were passed. Both sets of engagements were contracts, both were then subsisting, and both had been entered into upon the faith of previous laws. As to both, therefore, it was beyond the constitutional power of the legislature, had it been so intended, "to impair their obligation."

What then, for that is the point to be solved, were the previous rights of creditors of husbands against the real estate of their wives?

In *Namceizaitz agt. Gahn* (3 *Paige*, 614) it was held that the wife's equity, as it is termed, was paramount to the claims of the judgment creditor. And in *Udell agt. Kenney*, (3 *Cow.* 590; 5 *Johns. Ch. R.* 464,) the court held, also, that it could not be disposed of by the husband without making a suitable provision for her support, to be determined by a reference, according to the circumstances of each particular case.

Besides, during the wife's life, the husband's title—and his creditor's title can be no better—was not absolute. It might be suspended at any moment, and even destroyed, by his misconduct. (4 *John. Ch. R.* 318; 4 *Haywood*, 19, 24; 2 *M'Cord*, 368; 5 *Monroe*, 340; 1 *Paige*, 620.)

On a foreclosure, the surplus moneys brought into court are subject to its jurisdiction as a court of equity, which, in such cases, never allows the fund to be taken out without a suitable

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provision for the wife and her children. And as the sums in this case are small and not more than sufficient, the whole, independently of the act of 1848, must be adjudged to the wives.

I might here add, however, that if there were any doubts of the rights of the married women in this case, antecedently to the act of 1848, that act would remove them. Its validity in respect of after-acquired property can not be denied. The competency of the legislature to enact that property, thereafter devised or descended to married women, should be their own, exclusive of their husbands, stands upon precisely the same footing as their power, even against the presumptive rights of heirs apparent already born, to alter the law of descents and testaments. The law of primogeniture at one time prevailed even in this republican country. At the time of its repeal and of the substitution of the present rule, did any one contend that it was necessary to save the rights, or rather I should say the pretensions, of then existing eldest sons? And are the mere expectations of creditors, as to property which may thereafter by possibility descend to their debtors' wives, of any more sacred character? When the constitution of the United States declared that no state should thereafter pass any law impairing the obligation of contracts, its object was to secure, not such airy possibilities, but substantial, well-defined rights, resting on specific contract, on legal obligation. Now, property which, when the act of 1848 went into operation, the wife did not then own, was clearly not subject to her husband's then debts. And yet all her property, "except only so far as the same might be so liable," was, by the second section, declared for the future to be her sole and separate estate. The property in the present case at that time was not hers, but her father's. It was liable, not for her *husband's*, but for her *father's*, debts. It did not become hers, nor had she any right in law, either contingent or vested, till her father's death, which did not happen till 1849. *Nemo est hæres viventis*—a living man has no heirs—is a maxim which, in the sense just indicated, is as old as the law. Her father had a right to give his property to whom he pleased, and

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the legislature had a right, in the event of his not doing so, to say that it should pass absolutely and unencumbered to his married daughters, free from any control or disposal of their husbands. No wrong, in either case, was done to the husbands or the husbands' creditors. They might be disappointed, no uncommon occurrence in this life, but a mere disappointment is not a breach of either law or constitution.

Decree accordingly, against the judgment creditor.

NOTE.—The foregoing decision was affirmed at the general term held in June, 1854. The decision in the case of Risher and wife agt. Morris and wife, *ante*, p. 266, was also affirmed at the same time.

SUPREME COURT.

BUTLER agt. WENTWORTH.

In an action of *slander*, the defendant in his answer may *deny* the charge, and as a further defence set up a *justification*. That is, the defendant may say this, "I have no recollection or belief of having so accused you, but secondly, if I did, the charge was true." CLERKE, J., *contra*, See his dissenting opinion.

New-York General Term, May, 1854.

By the Court—ROOSEVELT, Justice. The plaintiff sues for slander, and alleges that the defendant falsely accused him of cheating. The defendant answers—first, I have no recollection or belief of having so accused you; but secondly, if I did, the charge was true. And the question is, does the Code admit of such a mode of pleading.

That it is a natural mode of meeting the complaint, all must admit; that it was a lawful one before the Code, in the form of a notice annexed to the general issue, will also be conceded. Is the Code then a narrowing or a liberalizing system? Its well-known origin and history answer this question. It contains, besides, an express provision on this very point. The defendant may, it says, set up "as many defences and counter-

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claims as he may have." Each, of course, should be separately stated, and be consistent with itself; but no rule of law requires that it should be consistent, not only with itself, but with every other defence which a proper forecast may interpose. It may be that, although a person honestly believes he never used the expressions attributed to him, and although, perhaps, in point of fact he never did use them, yet the bystanders, from misapprehension, or some other cause, may have understood him differently. And should these bystanders, called as witnesses on the trial, honestly or otherwise, swear to a mistaken version of the transaction, must the injured party not only submit, as he must, to that injustice, but be deprived also, as a further consequence, of another, and confessedly good defence, namely, a complete justification of the charge, if, in truth, it were ever made? So to interpret the Code, and the pleadings under it, would hardly be said to be calculated to promote "substantial justice between the parties." And if there be any one duty more than another enjoined on the judges, under the new system, it is that which is implied in the words just quoted. Substantial justice, as distinguished from artificial niceties and technical refinements, is made the star and compass which, for the future, are alone to guide the course of judicial exploration. For one, I do not regret the change, if change it be. The old light-houses, although at times useful, it must be admitted were the cause of frequent shipwrecks—as many a disappointed practitioner and ruined client could, no doubt, feelingly testify.

My conclusion is, that the decision at special term, allowing the two defences to be separately stated, was right, and ought to be affirmed with costs.

CLERKE, J., dissented. Complainant alleges that the defendant had charged the plaintiff with cheating in his business. The defendant traverses the complaint, and as an additional defence, sets up by way of justification, that the plaintiff did cheat in his business.

Can this be allowed? Can the defendant be permitted to deny the allegations in the complaint, and at the same time

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claim the right to prove the truth of the words he positively swears he never uttered?

Under the original system of pleading, before its symmetry was disfigured by ill-considered legislation and judicial expedients, equally unwise, one of its most prominent and inflexible rules was, that matter in confession and avoidance could not be combined with a traverse. Among the many evils introduced by the general issue, and one of its most mischievous anomalies, was the allowance of inconsistent pleas. The Statute of 4 *Anne*, c. 16, adopted by us, allowing several matters to be pleaded, (in itself a useful provision,) prepared the way for this innovation. This statute required that the leave of the court should be first obtained; and in the beginning courts refused to permit several defences, where they appeared to be inconsistent, such as pleading to the same trespass *not guilty*, and *accord and satisfaction*, or *non est factum*, and *payment* to the same demand. (*Comyn's Digest Pleader*, E. 2.)

But when, in the course of time, the rules of pleading were nearly abrogated, by allowing a defendant to prove almost anything under the general issue, or to plead any matter in addition to it, of course inconsistent pleas were tolerated; every special plea in bar being inconsistent with the "general issue."

This was a deviation from a most salutary principle. It was utterly at variance with the original purpose of those preliminary statements, which we call *pleading*, to allow a party to deny the allegations of his adversary, and at the same time to set up matter contradictory of his denial. This would defeat one of its most convenient objects, which is to compel the parties by the operation of their mutual allegations to elicit, as nearly as possible, the precise issue to be tried; thus saving to the parties, and the court at the trial, the labor and delay of an unnecessary accumulation of evidence. Now, for this, if for no other or higher end, they should allege the truth, and nothing but the truth; if, however, you allow a defendant to deny the charge in the complaint, and in the same breath to justify it, you encourage him to assert what is false, by doubly fortifying

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his chances of success. Thus as under the practice established under the general issue, (which if not already, I hope soon will be defunct,) he would have the chance of succeeding, not only on the strength of his own case, but by failure of the plaintiff's proof.

It is of the *essence* of an answer in justification or excuse to confess the allegation, which it proposes to answer or avoid; and if the defendant does not confess the allegation, but traverses it, the truth or falsehood of that allegation is the only issue for the court to try.

In endeavoring to get rid of the useless formula, the complexity and subtleties of the science of pleading, the legislature did not intend to abolish its essential principles. It has abolished the forms of action, and all useless and merely scholastic distinctions, as well as every technicality calculated to render any system of preliminary altercations nugatory.

In numerous instances since the adoption of the Code, these principles have been recognized and applied, and in cases precisely similar to this they have been frequently asserted and recognized. Anibal agt. Hunter. (6 *How. Pr. R.* 255.) Lewis agt. Kendall. (*Id.* 59.)

In Arnold agt. Dimon, (4 *Sand. S. C. Rep.* 680,) OAKLEY, J., declares the rule on this subject to be, "Where facts are alleged in an answer, which from their nature must be within the personal knowledge of the defendant, and which, if true, are a complete answer to the claim, he shall not set up in addition another state of facts not consistent with the previous defence."

If the defendant in this action has uttered the words charged in the complaint and denies the charge, he is asserting *what he knows to be false*; he knows whether he uttered them or not, and we must not sanction falsehood by allowing him to justify.

If he has not uttered those words, *we have nothing to do with the character or conduct of the plaintiff; that can only be inquired into in reference to the justification of the defendant for uttering them.* We have neither the disposition nor the time to investigate character or conduct as independent subjects of inquiry;

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and the only issues which can arise on the trial of this action are :

1. Did the defendant utter the words charged in the complaint ?

2. *If he did*, are they true ?—the truth being a justification.

The objection is offered that, if the defendant is not permitted to justify, the plaintiff may by possibility prove by false witnesses, that the defendant uttered the slander charged in the complaint, and he would then be without redress, unless he could fall back upon the justification and prove the truth of the charge. But, is not the plaintiff in this respect as much in the defendant's power as the defendant is in the plaintiff's ? For aught we know, the defendant is as capable of proving the truth of the charge by perjury, as is the plaintiff of proving the utterance of the slander by the same means. We are not to act in reference to such a contingency arising from either side. The only protection the law affords against false evidence consists in the pains and penalties of perjury, *after it is committed*. If such an apprehension were to find any place in our deliberations, it would require either a complete restoration of the old system in all its amplitude, or the abolition of preliminary statements altogether. To guard, for instance, against the danger of an insufficient statement of the cause of action, or the hazard of the proofs varying materially from the statement, or against a doubt existing as to the legal sufficiency of one or another of two or more different modes of framing a count, we ought to have the old declaration, with its prolixity, repetitions, and numerous counts, not forgetting the general issue, with the license of pleading or proving anything or everything under it ; or, I should prefer, if the possibility of perjury under such circumstances is so imminent as to counterbalance the advantages of pleading, that the system should be abolished altogether, and the parties be permitted to go to trial without preliminary altercations.

The only purpose, then, for which this matter alleging the truth of the charges in the complaint could be retained is to show mitigating circumstances ; but it is only where the de-

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fendant confesses and avoids that he can show mitigating circumstances. (Graham agt. Stone, 6 *How.* 115; Newman agt. Otto, 4 *Sand. S. C. R.* 668; Fry agt. Bennett, 5 *id.* 54.)

I entirely concur with JOHNSON, J., in Graham agt. Stone, in all the positions he supports in that case; and although other judges have not acquiesced in his conclusions, that mitigating circumstances must necessarily be pleaded in connection with a justification, to me it is clear that they cannot, at all events, be pleaded where the defendant denies the charges in the complaint.

The decision of the special term, then, ought to be reversed.

I have dwelt somewhat longer on the subject of this appeal than its importance at first sight would seem to require, but I think we should avail ourselves of every opportunity of constructing a rational system of pleading, by which the great end of all preliminary statements may be accomplished, and this can only be done by retaining all that is conducive to this end, in the original system, and lopping off all that is at variance with it. While we studiously avoid the subtleties, the fictions, the scholastic distinctions, and useless formula of that system, together with the later innovations, by which its primary object was entirely frustrated, we can preserve those principles originally belonging to it, by which issues may be developed by the effect of the parties' mutual allegations, and materiality, singleness and certainty in these issues secured, and obscurity, prolixity, and delay avoided. The Code enables us to do this effectually, and as every successive occasion presents itself we shall have abundant opportunity, by combining our practical experience with our theoretical knowledge of those principles, to construct a system surpassing any yet established in facilitating the administration of justice.

Lansingh agt. Parker and another.

SUPREME COURT.

LANSINGH agt. PARKER AND ANOTHER.

Pleas which were not inconsistent under the former practice, will not be held inconsistent as *answers* under the Code.

Tompkins Special Term, May, 1854. Motion to strike out answers as being inconsistent with each other, or that defendants elect which they will retain.

The complaint was for an assault and battery. The answers were, 1st. A general denial. 2d. That plaintiff committed the first assault, &c. 3d. That he was in defendants' inn, making a great noise, &c., and defendants requested him to leave and he refusing, they gently laid their hands on him to remove him, &c.

A. COATES, *for Motion.*

MINER & SLOAN, *Opposed.*

SHANKLAND, Justice. After consulting with all his associates of the sixth district, denied the motion—*holding*, that pleas, which were not inconsistent under the former practice of the courts, will not be held inconsistent as answers, under the Code. All the justices in that district concurred in this decision.

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SUPREME COURT.

HOLLENBECK agt. CLOW.

In pleading defences under the Code, a defendant should never be required to elect between a denial of a material allegation in the complaint, authorized by *sub. 1* of § 149, and new matter constituting a defence under *sub. 2* of that section.

That is, the principle illustrated amounts to this, that a defendant should never be required to *admit* allegations in the complaint, which he might otherwise be able to deny, as the *condition* upon which he is to be permitted to set up affirmative matters of defence.

If, therefore, the defendant can deny the alleged assault and battery and false imprisonment, he ought to be permitted to do so, and yet not be deprived of the right to avail himself of a justification, if he have one. (*See contra, Roe agt. Rodgers*, 8 *How. Pr. R.* 356; 4 *Sand.* 664, 690.)

Or, where the plaintiff alleges the speaking of certain slanderous words by the defendant, and the defendant denies the allegation, and then alleges that the words were spoken under such circumstances, and with such explanations, (describing them,) as to show that they were not slanderous, he should be allowed to do so.

Because, if the latter should appear in evidence, it would sustain the defence under the general traverse.

And it does not follow that such a defence should be stricken out, because it contains matters which might be proved under the general denial. These matters constitute a defence—a bar to the action.

The power of the court to require a defendant to elect between defences alleged to be inconsistent, should be limited to cases where the several defences contain matters so inconsistent that the proof of one defence would *necessarily disprove* the other.

Albany Special Term, Feb. 1854. Motion to strike out, &c.

The action is for slander. The charge, as stated in the complaint, was that the plaintiff had stolen the defendant's hay. The defendant first denied "each and every allegation in the complaint." The answer then proceeds as follows: "And the said defendant further answering says, that all the words which were spoken or uttered by the defendant of, to, or concerning the said plaintiff, as set forth in the complaint, charging him, said plaintiff, with stealing, or taking hay, or that the plaintiff had stolen the defendant's hay, were spoken and uttered by the defendant in reference to a quantity of hay which

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the defendant had cut and stacked in the summer of 1853, and to which hay the plaintiff claimed title, and which hay the plaintiff, under such claim of title, in the day time, took and removed upon lands adjoining to, and in sight of where it had been left by the defendant, which trespass or transaction, and not the crime of larceny, was all that the defendant intended by the speaking of said words, and was so understood by, and explained to, all who heard the defendant utter the words."

The plaintiff moved to strike out the latter defence, on the ground that the same is irrelevant or redundant, and also upon the ground that it is inconsistent with the general denial contained in the answer.

C. P. COLLIER, *for Plaintiff.*

L. TREMAIN, *for Defendant.*

HARRIS, Justice. Under the former practice, the defendant might plead as many separate matters as he should think necessary to his defence, subject to the power of the court to compel him to elect by which plea he would abide in cases where he should plead inconsistent pleas. (2 R. S. 352; *Graham's Pr.* 244.) But the Code contains, in terms, no such restriction upon the right of the defendant to interpose different defences. It declares that the defendant may set forth by answer as many defences as he may have. When, therefore, the court assumes to compel the defendant to elect between inconsistent defences, it must do so on the ground that from the very nature of the case it is impossible that the defendant can have two such defences. But as I understand the theory of pleading defences under the Code, a defendant should never be required to elect between a denial of a material allegation in the complaint, authorized by the first sub-division of the 149th section, and new matter constituting a defence under the second sub-division of the same section. I suppose a defendant should never be required to admit allegations in the complaint, which he might otherwise be able to deny, as the condition upon which he is to be permitted to set up affirmative matters of defence. It may be, that the plaintiff will be able to prove his allegations,

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even when the defendant might honestly deny their truth. In such a case, he ought not to be compelled to forego any other defence he may have, as the price of such denial. If, as in *Roe agt. Rogers*, (8 *How.* 356,) the defendant can deny the alleged assault and battery and false imprisonment, I think he ought to be permitted to do so, and yet not be deprived of the right to avail himself of a justification, if he have one. Indeed, such defences are not *necessarily* inconsistent. If, for example, the alleged assault, &c., consisted of an arrest, then the justification, showing that the arrest was lawful, may also be regarded as disproving the allegations of the complaint. I am of opinion that the power of the court to require a defendant to elect between defences alleged to be inconsistent, should be limited to cases where the several defences contain matters so inconsistent that the proof of one defence would *necessarily* disprove the other. It might well be said that the defendant could not have two such defences.

Such was substantially the practice in the late court of chancery. In *Hopper agt. Hopper*, (11 *Paige*, 46,) the defendant was allowed to answer a bill filed for a separation on the ground of cruel treatment, by denying the charge, and then setting up recriminatory charges against the plaintiff. The chancellor said, "The defendant cannot set up two distinct defences which are so inconsistent with each other, that if the matters constituting one defence are truly stated, the matters upon which the other defence is attempted to be based, must *necessarily* be untrue in point of fact. But the defendant may deny the allegations upon which the claim to relief is founded, and, at the same time, set up other matters, *not wholly inconsistent* with such denial, as a distinct or separate defence. So, in *Wood agt. Wood*, (2 *Paige*, 108,) where the bill was filed for a divorce on the ground of adultery, it was held, that the defendant might deny the adultery charged, and also set up any other matter in bar of the divorce, *if the plaintiff should succeed in proving his allegations*.

Assuming this to be the true doctrine on the subject, as applicable to defences under the Code, as I think it is, it follows

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that the cases of *Schneider agt. Schultz*, and *Arnold agt. Dimon*, cited by Mr. Justice CRIPPEN, in *Roe agt. Rodgers*, from 4 *Sand.* 664, 680, were not well decided. In the former of these cases, the action being for an assault and battery, the defendant denied the assault, &c., and then averred that the plaintiff made the first assault. The latter defence was not so entirely inconsistent with the denial of the assault as to require the court to put the defendant upon the alternative of admitting the assault, or losing his defence. The decision in *Arnold agt. Dimon* is still more objectionable. The action was against a carrier for the loss of goods. The defendant denied that he was the owner of the vessel upon which the goods were shipped. In other words, he denied, as he might do, a material allegation in the complaint. And then, he averred, as matter of defence, that the goods had, in fact, been delivered to the plaintiff. It is quite possible, to say the least, that both these defences might have been true. They were, therefore, not wholly inconsistent, and should have been allowed to stand.

In the case now under consideration, the matters stated in the second defence are not inconsistent with the general denial in the answer. On the contrary, I am inclined to think these matters might have been given in evidence to sustain the issue made by the defendant upon his general denial. The plaintiff alleged the speaking of certain slanderous words by the defendant. The defendant alleges that the words were spoken under such circumstances and with such explanations as to show that they were not slanderous. If this should appear in evidence, I think it would sustain the defence under the general traverse. The allegation that the defendant had uttered the slanderous words would be substantially disproved.

Nor does it follow that the second defence should be stricken out, because it contains matters which may be proved under the general denial. It was never good ground of general demurrer, that a plea amounted to the general issue. The objection might be taken, but, being regarded as mere matter of form, it was only available when taken by special demurrer. The Code has retained no such ground of demurrer. The

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question in every such case now is, whether the matters stated constitute a defence, and not whether they might have been proved under some other form of pleading. The true doctrine on this subject is stated by Mr. Van Santvoord, in his Treatise. (*See Van Santvoord's Pl. 261, 277.*) That learned writer has well said that the plaintiff cannot in any sense be said to be "aggrieved" by such a defence, if it be matter really proper to be proved in bar of the action. In such case the answer apprises him of the exact point of the defence in the shape of new matter. Such a pleading is in full accordance with the leading principle of the Code upon the subject.

My conclusion is, that the matters contained in the defence embraced in this motion constitute a defence to the action, and are well pleaded. The motion must therefore be denied with costs.

SUPREME COURT.

WHEELER agt. WHEEDON AND OTHERS.

DUNNING agt. THE SAME.

Where judgment creditors filed their complaint in the nature of a creditor's bill, against the judgment debtors, after a general assignment made by the latter for the benefit of creditors, to reach the effects of the judgment debtors, and also a debt due to them from one of the assignees, who was a preferred creditor and a party defendant—the other assignees not being made parties—the suit not being in hostility to, but in affirmance of the assignment.—And judgment rendered for plaintiffs and a receiver appointed.

And where other junior judgment creditors subsequently filed their complaint against the judgment debtors and their assignees, for the purpose of setting aside the assignment as fraudulent and void, &c., and judgment was accordingly rendered for the plaintiffs, declaring the assignment fraudulent and void as against creditors, and appointing a receiver, &c.

Held, that the receiver in the former suit could not be allowed to open the decree and come in and defend in the latter suit, by setting up a prior equity in favor of the plaintiffs in the former suit, and claiming to be first paid out of the funds in the hands of the receiver in the latter suit.

Because, it was not necessary to make the plaintiffs in the first suit parties to the

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latter, as the latter claimed in hostility to the assignment, and the former in affirmance of it, therefore a defence by the assignees was a defence by all the creditors, whether parties or not, who were to be regarded as represented by their trustees and in privity with them. Consequently, there was no prior equity, by creditors claiming a fund, under an assignment sought to be affirmed by them, placed in the hands of a receiver by a decree declaring that assignment void.

Washington General Term, May, 1853. HAND, CADY, and ALLEN, Justices.

This is an application for an order that Mansfield T. Walworth, as receiver of the effects of Royal C. Wheedon, may, by an amendment, be brought in as a party in the above actions, and may defend the same and claim and interpose his priority to the money and effects in the hands of A. Bockes, Esq., the receiver appointed therein.

The petition states that the actions were commenced against the Wheedons as judgment debtors of the complainants, after executions returned unsatisfied, and against the other defendants as assignees in trust of the said judgment debtors, to pay certain debts, which assignment was alleged to be fraudulent and void. That the suits were commenced in July, 1852, and were at issue and tried before W. T. Odell, Esq., referee in each cause, on the 9th of November, 1852, and a judgment rendered on his report on the 13th of November, and notice of the judgment served on the 15th of November. That the referee set aside the assignment mentioned in the pleadings, and ordered the money in the hands of the assignees to be applied on the plaintiffs' judgments respectively against the Wheedons, and judgment was also entered appointing Judge Bockes, the plaintiff's attorney, receiver in each cause. That said referee set aside the assignment, on the ground that it was fraudulent and void, and ordered the effects and avails in the hands of the assignees to be paid over to the receiver, who has received, or is about to receive them. That Dunning's judgment was obtained on the 5th of Feb. 1852, and Wheeler's on the 10th of Feb. 1852.

That on, or about the 1st of January, 1852, John B. Spelman, Alexander Frazer, and John W. Perigo, being judgment cred-

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itors of Coggsall, Royal C. and James Wheedon, on a judgment obtained against them in this court in February, 1851, filed a complaint in the nature of a creditor's bill, to reach the property and effects of the two Wheedons, which they were unable to reach on execution, in which the three Wheedons and Wm. Gearn were defendants. That the Wheedons did not appear or put in any answer, but Gearn appeared and answered. The object of the suit was to reach the effects of the Wheedons wherever situated, and to reach a debt due to them from Gearn. That the issue as to Gearn was tried before a referee on the 1st of November, 1852, who has made a report in favor of the plaintiffs, on which judgment was rendered against the Wheedons for \$424.13, besides costs, and that they severally assign to the receiver all their interest in the assignment, which report has been filed and judgment entered thereon in the clerk's office of Saratoga county. That on or about the 23d of March, 1852, John T. Wentworth, Esq., was duly appointed a receiver in the last suit, of all the debts, property, equitable interests and rights of the Wheedons, or either of them, with the usual powers of receivers, and the Wheedon's were directed to deliver over and assign to the receiver all such property on oath, to abide the judgment to be recovered in said action. That the receiver filed the requisite security and became entitled to enter upon the duties of his office on the day last aforesaid, but shortly afterward removed to the state of Illinois, and the petitioner was duly substituted as such receiver on or about the 8th of November, 1852, with the same powers, and filed the requisite security, and became entitled to act as such receiver. That the assignment mentioned in the causes above entitled, and therein sought to be avoided, is the same as mentioned in the Spelman suit, and therein sought to be affirmed, and the property covered by it is the same, and consists of real and personal estate. That the petitioner as such receiver, though he has received no property, insists that he is entitled to sufficient of the personal estate, mentioned in the assignment, to pay the debt of the plaintiff in the Spelman suit, and that for the purpose of determining the priority of plaintiff's claims in

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each of said suits, it is necessary that he should be made a party to the actions above entitled. That the petitioner knew nothing of the suits in favor of Wheeler and Dunning, until after judgments were entered therein as aforesaid, and has not had time to prepare papers for this motion until now. That the judgment in the Spelman suit was obtained upon a note, the payment of which was preferred in the said assignment in trust. That he is fearful that Bockes as receiver will apply the moneys and effects in the hands of said assignees in trust to the payment of the plaintiffs' judgments in the suits of Wheeler and Dunning, unless restrained by order of this court. That he has requested Bockes to allow him to come in as a party to these suits, but he declined. The petition prays for an order directing the petitioner to be made a party to the suits and be permitted to claim and prove his priority of interest as such receiver in the effects in the hands of the assignees in trust, or in the hands of said Bockes as such receiver, and interpose such defences as he may be advised, so that a complete determination of the matters involved in said suits may be had, or for such relief as the court may grant.

The answering affidavit states, that the suits were commenced on the 13th of May, 1852. That the only funds expected were \$800 or \$1000 in the hands of Ingerson and Prior, two of the assignees. That none of the defendants appeared except the assignees, who answered by their attorney, B. C. Thayer, Esq. That Bockes, as receiver, received from Ingerson and Prior \$542.64, and discharged the assignees. That the receiver, Judge Bockes, has been at an expense of \$50 in prosecuting the suits, which were defended with great pertinacity. That Gearn, one of the assignees, was the father-in-law of the assignors, and was made a principal preferred creditor by the terms of the assignment, and received from the property of the assignors about the sum of \$3000. That no part of the property and effects received by him have been obtained in these actions, and only the balance above stated has been received by Bockes. That a few days before the hearing of the causes, Gearn absconded, having converted nearly all his property into

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cash, and taking with him from \$4,000 to \$7,000. That he has not been heard of since, and his attorneys have attacked the small remnant of his property, the avails of which will not satisfy their demands. That the Spelman action was commenced on the 1st day of December, 1851, by B. C. Thayer, as attorney for the plaintiff, and was put at issue on the 27th of May, 1852. That the complaint contains no allegation of fraud in the assignment, nor are the assignees made parties thereto, nor does the complaint ask to set aside the assignment, but proceeds on the assumption of its validity. That in April, 1852, the said assignees had a meeting for the purpose of distributing the funds under the assignment, and Thayer, as attorney for Spelman & Co., appeared, and claimed a dividend, on the Spelman demand. That the assignees made no dividend, and these suits were shortly after commenced. That when the judgments in these causes were recovered, and when the money was paid over to Bockes, he was not aware that the receiver in the Spelman case claimed the funds, or did claim them until he demanded them on the 23d of November, 1852. That finding, on examining the pleadings in that case that the assignees were not made parties to the suit, and that the assignment was not attacked, nor the funds in the hands of the assignees claimed, and having in his hands no funds derived from the defendants in the suit in which he was receiver, nor from either of these defendants, he, Bockes, declined to surrender the money. That notwithstanding Thayer was the attorney in the Spelman suit, yet he defended as the attorney for the assignees to prevent the funds from being reached by the creditors. That the actions above entitled are the first and the only actions wherein the assignees are made parties.

W. L. F. WARREN, *for Petitioner.*

A. BOCKES, *for Plaintiffs.*

By the Court—C. L. ALLEN, Justice. The plaintiffs in the Spelman judgment filed their complaint in the nature of a creditor's bill against the Wheedons and William Gearn, in Jan. 1852, to reach the effects of the Wheedons, who were the judgment

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debtors, and a debt supposed to be due from Gearn to them, and to reach funds received by him as a preferred creditor in an assignment before then, executed by the Wheedons, to Gearn and others who were not made parties. The plaintiffs in the two actions herein entitled on the 13th day of May, 1852, each filed complaints against the three Wheedons, and also William C. Wheedon, and others judgment debtors, and Gearn; and included in their suit Asa Ingerson and William Prior, who, with Gearn, were the assignees in the assignment alluded to; claiming not only to reach the effects of the Wheedons, as judgment debtors, but also alleging that the assignment was fraudulent and void as to creditors, and praying that it might be set aside. In point of time, then, the plaintiffs in the Spelman suit filed their complaint *first*, and under ordinary circumstances would be entitled to a priority as to the equitable interests of the judgment debtors, even although their judgment might be junior to the judgments of the plaintiffs who filed their bills last. This, however, is not the case here. The lien is acquired by the filing of the complaint. It operates as an attachment of property which cannot be levied on at law. It gives to the vigilant creditor a right to a priority in payment, and the creditor filing a second complaint will have the second lien. (2 *Hoff. Pr.* 116; *Corning agt. White*, 2 *Paige*, 567.)

If an assignment is made after the commencement of the suit it gives to the assignees a right to the surplus after payment of the plaintiffs' debt. The plaintiffs in the Spelman suit sought to affirm the assignment, which bears date the 25th of March, 1850, and is executed by Royal C. Wheedon and James W. Wheedon, as co-partners, to Prior, Ingerson, and Gearn, and assigns and conveys real as well as personal estate. It creates Gearn the principal preferred creditor and places him in the first class, and also prefers Coggsall Wheedon, for certain amounts, and places him among others in the second class. The plaintiffs complaint sought to reach, among other things, Coggsall Wheedon's preferred interest in the assignment. The co-assignees of Gearn were not made parties to that suit.

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If the assignment was a valid one, it passed all the property of the assignors, subject to the liens on the real estate acquired by the several judgments previous to its execution, to be distributed according to its directions. Having been attacked, however, in the Wheeler and Dunning suits, a trial was had before a referee, who has decided it to be fraudulent and void as against the creditors of the assignors; and Judge Bockes was duly appointed receiver in those two suits. The assignment being set aside, so far as the real estate is concerned, the creditors would perhaps be placed upon their original footing, and the oldest judgment would be entitled to have the preference, (4 *Paige*, 42,) unless the oldest had dispensed with their liens by affirming, or agreeing to affirm, the assignment, their judgment having been recovered after its execution and delivery.

The receiver in the Spelman suit was appointed in March, 1852, and having removed to the state of Illinois, the petitioner was appointed in his place and duly qualified. When his appointment was completed, the whole of the equitable interests and effects of the defendants in that suit was vested in him, subject to the order, without an assignment; and so far as the personal property was concerned, he could have maintained an action for the property belonging to them, without showing an assignment. *Wilson agt. Allen*, (6 *Barb.* 542.) And if he is entitled by priority, or if the plaintiffs in the Spelman judgment are entitled by priority, to have their debt first paid out of the funds in the hands of Judge Bockes, who was afterward appointed receiver in the other suits, he can apply by proper petition to the court for an order for that purpose, without the necessity and expense of being brought in as a party to those suits, and interposing a defence there. The decrees in these suits require Bockes to pay according to the rights and priorities of all creditors. The words are, "that he will pay and satisfy the Wheeler and Dunning demands," subject to "the equitable rights of the creditors of said Royal and James Wheedon, who have commenced creditor's suits." This view would dispose of the present motion, leaving the petitioner to make the proper application to the court; but the petitioner

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asks for general relief, and perhaps a further consideration of the questions presented may save the necessity of another motion. What defence then I ask would the petitioner be entitled to, or does he seek to set up there, which the assignees have not already made, and which has been overruled? I do not understand that it was necessary for Wheeler and Dunning to have made the plaintiffs in the Spelman suit parties to their suit, where they claimed in hostility to the assignment. A defence by the assignees in such a case is a defence by the *cestui que trust*.

In Rogers agt. Rogers, (3 Paige, 379,) the chancellor said, "as a general rule, the *cestui que trust*, as well as the trustee, must be parties, especially where the object is to enforce a claim consistent with the validity of the trust; but where the complainant claims in opposition to the assignment or deed of trust, and seeks to set the same aside on the ground that it is fraudulent and void, he is at liberty to proceed against the fraudulent assignee or trustee, who is the holder of the legal estate in the property without joining the *cestui que trust*," (and see 4 Paige, 28.)

In Russell agt. Losher, (4 Barb. 232,) these cases were cited and approved, and the court said that where a defence was interposed by the assignees, it was a defence by all the creditors, whether parties or not, who are to be regarded as represented by their trustees, and in privity with them. They are only bound, however, by the *bona fide* acts of the assignees; and a creditor not made a party, may be allowed to impeach a decree if he offers to prove and can prove that it was fraudulently obtained. But unless he can show that he is not a stranger to the decree, it may be used as evidence against him, and until he proves that it was improperly obtained, it is as conclusive upon him as upon the parties before the court when it was pronounced.

It is not pretended here but that the decree was fairly obtained, nor but that the assignees defended in good faith, and protected as far as they could the rights of all the creditors interested in the assignment. No appeal has been taken from the judgment of the referee, and by that judgment the assign-

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ment has been set aside as fraudulent and void. The only ground on which this motion is based, as I understand it is, that the plaintiffs in the Spelman judgment have prior equities to the plaintiffs in these two causes, and are entitled to be first paid out of the fund in the hands of the receiver in those suits.

What good reason, therefore, is there for opening the decree and for letting in the petitioner as receiver in the Spelman suit? Does he ask to defend on the ground that the decree was improperly obtained? No such pretense is set up in his petition. He does indeed proceed upon the assumption that the assignment was valid, and seeks to affirm it. This, on the part of the plaintiffs in the Spelman judgment he has a right to do, and as to *affirming* creditors, the assignment may be good. (5 *Paige*, 15; 6 *id.* 577; 13 *Wend.* 240.) But what right, as affirming creditors, have they more than the assignor himself to funds acquired under a decree pronouncing that assignment void, and directing the funds in the hands of the assignees, to the amount of \$592.64, to be paid over into the hands of the plaintiffs' receiver. True, the decree declares the assignment to be void as against the *creditors* of Royal and James Wheedon; that the cases cited show that an assignment thus declared void, is not so as to creditors assenting to and affirming it by their acts or consent; they are then estopped from alleging any fraud, when, with a full knowledge of the facts, they have assented to it. In this case, the plaintiffs in the Spelman suit set up the assignment in their suit as a valid one, and seek to enforce payment of their debt out of funds secured to Coggs-shall Wheedon as a preferred creditor, and out of funds in part in the hands of Gearn, or paid into his hands as a preferred creditor by his co-assignees. The assignees were not made parties to the Spelman suit, nor is there any allegation or pretense that the assignment was fraudulent. True, Gearn, one of the assignees, was brought in, but not as an assignee. The claim was against him individually, to reach a fund which it was alleged he had received for the purpose of paying the Spelman debt, and which he had promised to pay on that consideration.

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The plaintiffs in the Spelman suit by their decree acquired a lien on the equitable interests of all and each of the defendants in their suit. Ingerson and Prior, two of the assignees, were not made parties to it, and all the fund received by Bockes came from them. Are they, or rather is the petitioner, then, entitled to claim a fund under an assignment which they seek to affirm, placed in the hands of a receiver in those two suits by a decree declaring that assignment void? It appears to me, that no such claim can be interposed. Suppose, as the petitioner seems to insist, that the assignment so far as the rights of those he represents are concerned should stand affirmed, then the assignees are bound to distribute the funds according to the directions in the assignment, and it does not appear that the plaintiffs in the Spelman suit are entitled to any *priority* to the fund in the hands of Bockes; and it would belong to the assignees to distribute according to the assignment. The plaintiffs in the Spelman suit being entitled to a pro rata share with many other creditors named in the second class of the assignment, they would acquire no lien by their suit, the assignment having been made before it was commenced.

It is true, if these creditors were standing in a different relation they would probably have acquired a priority of lien, having filed their complaint in due season. But if they had sought to annul the assignment, and had not taken the proper steps to secure a priority before the plaintiffs acquired their rights by filing their complaint and obtaining their decree, I do not see why they should be entitled to come in at this stage of the proceedings and under the peculiar circumstances in this case, and claim the benefits secured by more vigilant creditors, who have incurred the risk and expense of bringing their suits to a successful termination, and thus profit by the exertions of others. Such was not the decision in *Edmeston agt. Lyde*, (1 *Paige*, 637,) nor in any other case since. The chancellor in the case in 1 *Paige*, said, "it would be unjust that a creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the avails, with those who have slept upon their rights."

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It is true that they filed their complaint first, but it was in affirmance of the assignment. It is also true that the petitioner swears here that he knew nothing of the Wheeler and Dunning suits, until after they obtained their judgments. But it does not appear that Spelman and his co-plaintiffs were ignorant of these proceedings. The same attorney who defended against the Wheeler and Dunning suits prosecuted the Spelman suit, and it has been shown that they were parties, and defended the suits by their assignees. (4 *Wend.* 272; 4 *Paige*, 23; 6 *id.* 879.) And they do not pretend now that the decrees were fraudulently or improperly obtained.

But they seek, after having affirmed the assignment on their part, to avail themselves of the benefits secured by Wheeler and Dunning; that is, after having defended unsuccessfully by their assignees, in endeavoring to sustain the assignment, against the allegations of the plaintiffs in the suits which claim it to be fraudulent and void, they ask to be substituted in the place of those plaintiffs, and to receive the very fund which they have endeavored to keep from their hands, thus claiming the advantage of the success of their adversaries. In my judgment, this would not be equity, and would not be protecting the rights of the most vigilant creditors.

The decree in the Spelman suit was, that the defendants assign to the receiver (petitioner) all their interest in the assignment, and the petitioner says the plaintiffs claimed, among other things, the rights secured to Coggshall Wheedon in the assignment as a preferred creditor. But what rights has Coggshall Wheedon as against Wheeler and Dunning, or other creditors, as to whom the assignment has been decreed to be fraudulent and void? And what rights has Gearn, as against whom the plaintiffs had not even a judgment? Clearly none, as he cannot have acquired any as against their judgment. And what rights has he as against funds derived from Ingerson and Prior, who were not made parties to their suit? I cannot perceive that he has any. Wheeler and Dunning obtained a priority of lien on the trust funds under a fraudulent deed of trust. (10 *Paige*, 9; 1 *id.* 637; 2 *id.* 267.) And by their decrees all

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other judgment creditors were bound. (4 *Barb.* 232; 4 *Paige*, 23; 6 *How.* 379.) The difficulty on the part of the petitioner lies in the fact, that the plaintiffs in the Spelman suit sought to affirm the assignment, and that they do not, therefore, stand in the same relation and are not entitled to the same priority which they would have obtained over Wheeler and Dunning by filing their complaint first, if it had been like theirs in hostility to the assignment. That having chosen to affirm the assignment, they placed themselves, so far as Wheeler and Dunning are concerned, on a footing with the assignees, and cannot first reap the benefits to which other creditors more vigilant, and who have elected to take a more successful course, have properly secured to themselves.

Motion denied, with \$10 costs.

SUPERIOR COURT.

THE PEOPLE, *ex rel.* DAVIS, &c., agt. STURTEVANT.

Notwithstanding the limitation implied in the title "*Of Civil Actions*," prefixed to part II of the Code, those provisions of that part of the Code which relate to costs upon appeals are applicable to appeals in special proceedings as well as to those taken in civil actions, strictly so called.

The question raised in this much litigated case is, whether the costs upon the appeal taken by Mr. Sturtevant and his associates, defendants in contempt, arising out of the Broadway railroad case, ought to be taxed under and according to the provisions of the Code, or the Revised Statutes. It is insisted, in behalf of Mr. Sturtevant, that the costs should be taxed under and in pursuance of the provisions of the Revised Statutes—that the provisions of the Code do not apply to such cases.

HENRY HILTON, *for relators.*

D. DUDLEY FIELD, *for defendants.*

By the Court, DUER, J. The court of appeals, in affirming the final judgment or order of this court, in the proceeding

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against the defendant as for a contempt, has awarded to the relators the costs of the appeal, and this judgment, as the proceedings have been remitted to this court, it has become our duty to execute and consequently to interpret. The question which we are called upon to determine is, whether the costs which the defendant is required to pay are those prescribed by the Code, or those which are taxable under the Revised Statutes.

Section 307 of the Code, subd. 7, declares that the costs to be allowed on an appeal to the court of appeals shall be \$25 before argument, and \$50 for argument; and the clerk in adjusting the costs has followed this direction. Mr. Justice BOWORTH has affirmed the decision of the clerk; but it has been earnestly contended that the decision is erroneous, as inconsistent, not only with the general design, but with express provisions of the Code.

I shall proceed to state in a condensed form the argument that was relied on to convince us of the error which we are urged to correct.

The jurisdiction which the court of appeals has exercised in this case, it is admitted, is derived from the Code; but we are assured that it is a mistake to suppose that the Code regulates the costs on every appeal which it sanctions. The jurisdiction is founded on subd. 3 in § 11, which gives an appeal "from a final order affecting a substantial right made in a special proceeding;" but the provision in § 307, which defines the costs to be allowed on an appeal, relates solely, it is said, to appeals in civil actions, and is not applicable *at all* to an appeal in a special proceeding. Section 11 is in Part I of the Code, which, following its title, treats *exclusively* of "The courts of justice and their jurisdiction." But § 307 is in Part II, which treats *as exclusively* "Of Civil Actions," meaning those actions, and those only, which the Code defines and regulates. It is true that in this second part appeals are embraced and treated of under the general head of "Civil Actions," but in the provisions relating to them, an appeal is considered not as a new and separate action, but only as a further proceeding in the original

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action in which the order or judgment appealed from was rendered: so that, throughout, appeals in civil actions, and those actions authorized by the Code, are alone intended. It was further observed, in confirmation of these views, that proceedings as for a contempt against a party in a civil action are governed entirely by the provisions of chap. 8, tit. 13, part 2, of the Revised Statutes, and are therefore proceedings which the legislature has declared that the Code was not designed, and shall not be construed to affect, (*Code*, § 47;) and it seemed to be thought a necessary conclusion that an appeal from a final order in such proceedings must be regarded as embraced in the exception.

This conclusion, however, so far from deeming it necessary, we do not hesitate to reject. It is true that section 13 of ch. 8, (2 R. S. 582,) which treats of "proceedings as for contempt to enforce civil remedies," is unrepealed in all its provisions; but these provisions relate wholly to proceedings in the court in which the contempt is sought to be punished, and contain not a single word in relation to the mode in which the final judgment or order of the court is to be reviewed by a higher tribunal. They have, therefore, no bearing whatever on the question we are now considering; since neither their construction nor their application can be varied in the slightest degree by holding that an appeal from such an order is subject in all respects to the provisions of the Code. The whole argument, therefore, on the part of the defendant, rests upon the truth of the allegation that the provisions in the second part of the Code, in relation to appeals in their just construction, must be limited to appeals in civil actions, since, that the proceeding against the defendant is not such an action, the court of appeals, in refusing to dismiss the appeal, has in effect determined.

The second part of the Code is entitled "*Of Civil Actions*," and that this title was meant to refer only to those actions which the Code defines and regulates we readily admit, nor is it necessary to deny that, under this general title, appeals in such actions are not properly comprehended.

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The title of a law, however, it not unfrequently happens, is much narrower than its actual contents; and in such cases it has certainly never been supposed that an express provision must be altered or exchanged, in order that the contents may be made to correspond with the title. The history of legislation shows, that of all the arguments which are used to fix the construction of a statute, that derived from its title is the weakest and most deceptive. In rare cases, the title has been invoked to aid, but in none has it been permitted to control the interpretation; on the contrary, when a plain discrepancy exists, it is not merely a reasonable, but a necessary inference, that the title is defective or erroneous.

It happens in the present case, that the Code itself furnishes the clearest evidence that the title of "Civil Actions," upon which the learned counsel for the defendant laid the stress of his argument, is essentially defective, and that this court upon full consideration has so determined.

The object of § 8 in the preliminary title of the Code, is to announce that division of the entire act which its framers had deemed it proper to adopt; and it declares that this division is into two parts, the first of which relates to "courts of justice and their jurisdiction," and the second not only to civil actions commenced after the 1st day of July, 1848, (that is, commenced under the Code,) but also, with the exception of the last four titles, to appeals to the court of appeals and other courts—an addition which, if appeals are properly comprehended under the general head of civil actions, was plainly unnecessary, unless appeals in other cases than in actions under the Code were meant to be embraced. That they were meant to be embraced, and that the latter words of the section were introduced in order to embrace them, this court, in *Kanouse agt. Martin*, (2 *Sandford*, 139,) has expressly decided, and in so deciding has held, that the title prefixed to the second part of the Code does not cover all the subjects which its provisions embrace, and therefore, as defective and partial, is manifestly erroneous. An argument founded upon this title we are therefore compelled to disregard.

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The action in Kanouse agt. Martin was commenced previous to the adoption of the Code, but the appeal to the court of appeals from the judgment of this court was subsequent.

The appeal had been dismissed with costs to the respondent, and the question to be determined was exactly the same as in the case now before us, namely, by what law the costs of the appeal were to be regulated. It was contended on behalf of the appellant, that the provisions in the Code relative to costs on an appeal were applicable only to appeals in civil actions commenced after the Code; but the learned judge who heard the motion decided that the general words in section eight extended to all appeals subsequent to the Code, without reference to the time of the commencement of the suit in which the appeal was taken, and that to hold otherwise would be a plain violation of the statute. It is true that this decision in its form was that of a single judge, but it was made with the full concurrence of two of his associates, and, as I personally know, was the result of their joint deliberation. It has therefore all the authority of a decision at general term.

It may be said, however, that the decision in Kanouse agt. Martin, so far as its authority is binding, only proves that costs on an appeal must be adjusted under the Code when the appeal is from a judgment in a civil action, and does not prove that the same costs must be allowed when the appeal, as in the case before us, is from a final order in a special proceeding. Hence, to meet the objection, a further examination of the provisions of the Code seems to be necessary.

I proceed then to the title of the Code which treats especially and exclusively of appeals. This is title No. 11 of the second part of the Code. It is headed, "Of Appeals in Civil Actions," and if the provisions that follow correspond with this title, the position for which the counsel has contended, notwithstanding our decision in Kanouse agt. Martin, is established, since we readily admit that it is only on those appeals which the Code regulates that the costs which the Code has specified can be allowed. It happens again, however, unfortunately for the argument that has been addressed to us, that it is met and

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refuted by a manifest variance between the title of the law and its actual contents, since the former implies a limitation which the provisions that follow decisively reject. It is true that the law (treating this portion or division of the Code as a statute) relates to appeals in civil actions, but it relates just as certainly to appeals in those special statutory proceedings to which the name of action can not properly be given. The 2d chapter treats of appeals to the court of appeals, and its first section (383) short, but most significant, is in these few words:—

“ § 383. An appeal may be taken to the court of appeals in the cases mentioned in section 11,” and the question at once suggests itself, for what purpose was this section inserted? Not assuredly for the purpose of defining the jurisdiction of the court of appeals, since this jurisdiction had already been given and defined by the section which is referred to; nor, if it is susceptible of any other construction, are we at liberty to regard it as an idle repetition of a previous enactment. We think that the plain and sole object of the section is to indicate the cases by a reference, without enumeration, to which the subsequent provisions of the chapter and all general provisions throughout the Code in relation to appeals to the court of appeals shall be construed to apply, and that the construction and effect of every section containing such a provision are consequently the same as if in each an appeal from a final order in a special proceeding were separately mentioned. Thus the section which immediately follows prescribes the written undertaking which must be executed on the part of the appellant to render an appeal effectual, and sections 327 and 328, in the preceding chapter, the notice which is necessary to be served and the duties of the clerk in transmitting the papers to the appellate court; and we apprehend it can not be doubted that all these provisions apply just as plainly and certainly to an appeal from an order in a special proceeding as to an appeal from a judgment in a civil action. At any rate, no such doubts were entertained by the learned counsel who have conducted the proceedings on the part of the defendant and his colleagues, since in taking the appeals from our determination, which

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they deemed it expedient to advise, the provisions of the Code were carefully and exactly followed.

Our conclusion is, that the appeals to the court of appeals, which are referred to in the title "Of Costs," are the same that the chapter "Of Appeals" has declared may be taken; and consequently, that to every appeal so taken the provisions that govern the allowance of costs must be construed to apply. The work of the framers of the Code would be manifestly incomplete had they omitted a provision for costs on any appeal which they meant to sanction and regulate. Legislation thus bungling and defective it would be unjust to impute to them. Whatever may be the terms in which other persons may choose to describe their labors, in my deliberate judgment they have accomplished, and, generally speaking, ably and successfully accomplished, a most difficult as well as important and honorable task.

The monument that has been raised, as a work of science and art, may doubtless be improved. Its defects may be supplied, and its proportions corrected or enlarged. But the foundations are solid and deeply laid, and the structure will stand. *Manet et manebit.*

There is an additional, and I think conclusive reason, for holding that the relators are entitled to the costs which they claim. Unless those allowed by the Code may be given, there are none to which they can be entitled; and the judgment which we are required to execute will be inoperative and void, from the absence of any rule or standard by which the costs that are awarded may be estimated. The Code has, in terms, abolished writs of error; and although not in terms, yet by necessary implication, it has abolished appeals as formerly understood and prosecuted.

It has abolished them by the substitution of proceedings so widely different that the costs which are taxed under the Revised Statutes can no longer be applied to them. It was said by the court, in the case of Kanouse agt. Martin, that if the writ of error is taken away the fees for prosecuting it must fall to the ground. If the proceeding, which is the principal, is

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abolished, the compensation for conducting it, which is a mere incident, can not remain. And these observations apply just as truly to the abolition of the proceeding which was formerly called an appeal as to that of a writ of error. The term "appeal" is indeed retained, but its meaning is so essentially changed that the proceeding which it denotes can with no more propriety be treated as an appeal in equity than as a writ of error. It is, however, to appeals in equity that the costs given by the Revised Statutes plainly relate. The court of appeals certainly meant that their judgment should be enforced, and if it can only be enforced by the allowance of costs under the Code, we are bound to say that these, and these only, are the costs which the judgment awards.

There remains only a single observation. The Code has declared (§ 491) that its provisions shall not affect appeals from surrogates' courts. The exception of these appeals was plainly unnecessary, had it not been seen that the general words of the Code would otherwise be construed to embrace them; nor would the exception have been confined to these appeals, had it been thought that any other were proper to be included. The solitary exception proves the rule—proves that in all the cases not excepted, the provisions of the Code in relation to appeals were meant to be understood in the full extent of the terms in which they are expressed. It is thus that we interpret them.

The decision of Mr. Justice Bosworth is therefore affirmed with costs.

SUPREME COURT.

COLWELL agt. THE NEW-YORK & ERIE R. R. Co.

Where the plaintiff in the first and second counts of his complaint claimed damages of the defendants—a railroad company—for killing cattle, (in the first count and swine in the second,) in going through his farm, the fences not being kept up by defendants as it was their duty; and for the wrongful killing, carrying away, and converting said cattle and swine.

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And in the third count set up an agreement to carry cattle on defendants railroad from one place to another, (specified,) and damages and loss occasioned by breach of agreement to carry safely—the hurt and loss of cattle by reason of weak and insufficient cars, &c., and also the conversion of such cattle as were killed; also putting his claim upon the defendants' liability as common carriers.

Held, that the causes of action stated in the first and second counts of the complaint did not arise out of contract, express or implied, and did not fall under the first, but under the *third* subdivision of § 167 of the Code.

Besides, in each of these counts a distinct cause of action in trover was stated in conjunction—not separately—with the cause of action for damages arising from negligence, which was fatal on demurrer.

The first cause of action stated in the third count was a cause of action arising out of an express contract within the meaning of § 167 of the Code, and consequently was improperly joined with the causes of action in the two first counts.

And besides, in the third count, two distinct causes of action for distinct injuries, caused in different ways and at two distinct times and places, were blended with a distinct cause of action in trover, which was also fatal on demurrer.

Broome Special Term, Feb. 1854. Demurrer to complaint for misjoinder of actions.

The plaintiff claimed damages for killing cattle in going through his farm, the fences not being kept up by the company as was their duty, and for the wrongful killing, carrying away, and converting said cattle, (the conversion consisted in taking the carcass up the track a short distance, and burying it.)

Cause of action, No. 2, was the same in regard to swine.

Cause of action, No. 3, set up an agreement to carry cattle on the railroad from Kirkwood to Chester, and damages and loss occasioned by breach of agreement to carry safely; hurt and loss of cattle by reason of weak and insufficient cars, &c., and also the conversion (in the manner above mentioned) of such cattle as were killed; also putting his claim upon the defendants' liability as common carriers. The complaint was very long, containing some nineteen folios. The opinion of the court covers the entire case.

HOTCHKISS, SEYMOUR, & BALCOM, *for Plaintiffs.*

MORRIS & TOMPKINS, *for Defendants.*

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MASON, Justice. This case comes before the court on a demurrer to the complaint, in which defendants have assigned three causes of demurrer.

First. Because it appears on the face of the complaint that the action is brought as well to recover damages for an alleged breach of contract made by the defendants with plaintiff as for damages by the plaintiff alleged to have been sustained in consequence of the wrongful taking and conversion of the property of the said plaintiff, as set forth in the said complaint.

Second. Because it appears on the face of the said complaint that the said cattle mentioned in the third cause of action specified in the said complaint were wrongfully taken and converted in the state of Pennsylvania and not in the state of New-York. And,

Third. Because the several causes of action mentioned and set forth in said complaint are not separately stated in said complaint.

The first and third causes of demurrer are relied upon by the defendants, and the second was abandoned upon the argument. The first and second causes of action stated in the complaint do not arise out of contract, express or implied, and do not fall under the first subdivision of § 167 of the Code, but fall under the third subdivision of that section.

The third cause of action stated in the complaint, I am inclined to think, on the contrary, is to be deemed a cause of action arising out of an express contract within the meaning of § 167 of the Code, and consequently is improperly joined with the two first causes of action. This third count sets forth an agreement of the defendants to carry the cattle in question, and alleges that the defendants undertook to furnish good and sufficient cars for the transportation of said cattle; that they disregarded the contract in this respect, and did not furnish good and sufficient cars, &c.; and that said cattle were pursuant to the undertaking of the defendants to be transported carefully and safely in said cars, and the defendants not regarding their undertaking to and with the plaintiff, did not furnish good and sufficient cars for the transportation of said cattle, and did not safely transport said cattle, &c.; and that by reason of defect-

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ive, weak, and insufficient cars, or one of them, and of the carelessness and negligence of the defendants, their agents and servants, said cattle in question were thrown out, and one of them killed, and the other lost, &c.

It is true that the count alleges the defendants' liability to arise out of the contract as we have stated, and also out of their duty as common carriers: the count is so framed that the plaintiff may, upon the trial, well claim to recover of the defendants upon a breach of their contract, and also in case for negligence founded upon a breach of their common law duty, as common carriers of property. This action against the common carrier might be either assumpsit founded on the contract or case founded on their duty as carriers. In the latter case, the defendants should be declared against as if their liability was founded on the custom of the realm or upon the duty which common law imposes upon common carriers of property. (2 Chit. Pl. 357, note a; 3 East, R. 62; 2 New, R. 345, 454; 12 East, 94; J. B. Moore, 141, 154.) This rule is recognized in the case of the Bank of Orange agt. Brown and others, (3 W. R. 158,) and is there distinctly affirmed. The court say in that case, "I apprehend the true rule now is, that an action solely upon the custom is an action of tort;" (3 W. R. 168;) "but if the plaintiff states the custom and also relies on an undertaking, general or special, then the action may be said to be *ex delicto quasi ex contractu*, but in reality is founded on contract and to be treated as such." (3 W. R. 169; Boson agt. Sandford, 2 Shaw, 478; 1 Id. 29, 101; 3 Mod. R. 321; 2 Salk. R. 440.) I am of opinion, therefore, that as this count is framed, it cannot be united with the two first.

But again, this count is also bad for several additional reasons, if we were to hold it not founded upon contract or an action arising out of contract. In this third count there are several causes of action all blended together in the same count. The 169th section of the Code requires them, although arising out of the same class, to be separately stated. (4 How. Pr. R. 226; 5 How. Pr. R. 171; 6 How. Pr. R. 298; 8 How. Pr. R. 177.) There are two distinct causes of action for distinct

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injuries to property caused in different manners, and at two distinct places, and on two distinct occasions; and besides, there is a distinct cause of action in trover alleged, charging the defendants with converting said cattle to their own use. This is made a distinct ground of demurrer and is fatal to this third count. The Code allows a demurrer, when "several causes of action have been improperly united," and they are improperly united, although of the same class, unless they are separately stated. The same objection exists to the first and second counts; a distinct cause of action in trover for carrying away and converting to their own use the property mentioned in these counts is stated in conjunction with the other causes of action.

There must be judgment for the defendants upon each count or upon the three causes of action, with costs, with leave to the plaintiff to amend on payment of costs.

SUPREME COURT.

**WILD AND OTHERS agt. THE BOARD OF SUPERVISORS OF THE
COUNTY OF COLUMBIA.**

In an action against a *county*, the suit should be brought against "*The Board of Supervisors*" of the county; but when the action is against the *supervisors*, the suit should be brought against them individually, specifying their name of office.

Where an action is brought against "*The Board of Supervisors*," it is not a ground for setting aside the proceedings, because the supervisors are not individually named; it will be assumed that the action is brought against the county. If the action is not against the county, the objection may furnish a good defence—the wrong party being sued—but not for setting aside the proceedings.

Albany Special Term, January, 1854. Motion to set aside summons and complaint.

The grounds of the motion, as stated in the notice, were, that no person or persons are named in the proceedings as de-

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fendants, and that the persons constituting the board of supervisors of the county of Columbia are not named individually, nor designated by their name of office.

H. HOGEBOM, *for Plaintiffs.*

THEODORE MILLER, *for Defendants.*

HARRIS, Justice. A county is a body corporate. Its acts and proceedings are in the name of the board of supervisors. It may sue and be sued in that name. (1 R. S. 364, §§ 1, 2, and 3, 384, §§ 2 and 3.) There is no ground, therefore, for saying that the defendants in this action can not be sued. The board of supervisors, and not the individual officers who in their collective capacity constitute that board, represent the body corporate known as the county. When such body corporate is to be sued, the action should be against the board of supervisors and not against the supervisors in their individual names, adding their names of office. Such has been the uniform practice. (See 7 Wend. 530; 19 Wend. 102; 10 Wend. 363; 19 John. 272; 3 Barb. 332; 4 Barb. 64; 9 Wend. 182; 26 Wend. 66; 5 Denio, 517.)

It is true that, by the 96th section of the article of the Revised Statutes relating to proceedings by and against public bodies, &c., (2 R. S. 474,) it is declared that actions against the officers named in the 92d section of the same article should be brought against them individually, specifying their name of office. Among the officers thus named are the supervisors of a county. But that it was not intended that this provision should be applied to a suit against the board of supervisors is obvious, as it seems to me, from the preceding 95th section, which declares that actions against counties shall be brought against the board of supervisors thereof. When the action is against the supervisors in their official character, I suppose it must be brought in the manner prescribed by the 96th section. But when it is brought against the board of supervisors as the representatives of the county the provisions of that section are inapplicable. It is then brought against a body corporate whose corporate name, instead of being the name of the county, is the board of supervisors of the county.

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Whether it was intended to make the county of Columbia the defendant in this action liable, it is not important, upon this motion, to inquire. If it was, the action is properly brought against the board of supervisors. If it was intended to bring the action against the supervisors, *as officers*, and not against the county, then I suppose they should have been named in the manner prescribed in the 96th section. In that case the plaintiffs may find it necessary to have their proceedings amended, but it furnishes no ground for granting this motion. It is but the case of a suit brought against the wrong defendant. It may furnish a good defence for the party sued, but no ground for setting aside the proceedings. It must be assumed, here, that the plaintiffs intended to sue the county of Columbia, and, if they did, the action is properly brought against the board of supervisors.

The motion must therefore be denied, but it is not a case for granting costs.

SUPREME COURT.

WHITTEMORE agt. SLOAT AND ANOTHER.

Where plaintiff alleged that she was tenant in dower, and had possession of the premises allotted to her, as her *estate* in dower; and also in effect alleged that a yearly rent or *charge* of \$400, a fixed sum, was set off to her, and made a specific *lien* upon the premises; in an action for the rent and lease of the premises.

Held, that her interest must be considered as a *lien* on, and not an estate in the premises.

Dower as an *estate* of the widow implies possession *in* her; a *rent charge*, on the contrary, possession *out* of her.

New-York Special Term, April, 1854. The complaint in this action alleged that the plaintiff was the widow of Samuel Whittemore, late of the city of New-York, deceased; that said Samuel died on the 22d June, 1835, seized and possessed of a large real and personal estate leaving said plaintiff, his widow,

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and ten children, (naming them,) that subsequently to his death a suit in partition in the court of chancery was commenced by Wm. T. Whittemore and others against plaintiff and others, for a partition of said estate. Subsequently a decree was made, and commissioners in partition appointed for the purpose of dividing said estate; and it was, among other things, ordered that said commissioners should admeasure and lay off to said plaintiff, as widow aforesaid, some part or portion of each and every one-tenth part, which part should be capable of yielding an annual income of at least \$400 per annum at an ordinary letting or renting thereof, provided said commissioners should be satisfied said \$400 did not exceed one-third part of the nett annual value of one-tenth part. And it was further ordered that the said several heirs at law should at all times thereafter, during the continuance of said estate as dower of the said widow, each for himself or herself, (and not one for the other,) pay and defray all the expenses, taxes, and assessments accruing for repairs, or charged, or imposed upon the part or portion of the said one-tenth part respectively, so that the said widow might hold the said one-third part respectively during her natural life, and the income to be received therefrom to the extent of \$400 per annum on each of said one-third part of said one-tenth part at the ordinary rates of letting the same, without charge thereupon or any diminution thereof; and so that in ordinary times the said widow might be secure of a clear income of \$400 per annum from each of the said one-third part of the said one-tenth part respectively.

And it was further ordered, that in case the income so to be derived by said widow from said one-third part of said one-tenth part respectively, or any or either of them during the continuance of the said estate in dower, should at any time exceed the clear sum of \$400 per annum, that then, and in such case, the said widow should pay over to the said parties respectively, &c., or their personal representatives or assigns, the amount of such excess annually, or as soon as the same should be received by the said widow.

And the said plaintiff averred that in pursuance of said de-

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cretal order, the said commissioners did accordingly make partition of the said estate among the parties to the said suit in partition, and did divide the said estate into ten parts, and allot to each of the said heirs one-tenth part thereof; and in pursuance of said order did admeasure to said plaintiff, as said widow, a part and portion of each of the said tenth parts, so allotted as a security for the dower of the said plaintiff. And said plaintiff averred that in making said partition, said commissioners did allot and set off to James Bayard Whittemore, one of said heirs, and the said plaintiff, certain real estate, as being one of the tenth parts of said estate, and that they did in particular set off and allot to said James B. Whittemore as, and for the share of his said estate, being one of the tenth parts above mentioned, a certain lot of land situated on the southerly side of Barrow-street, extending to Fourth-street in said city of New-York; and that said commissioners did also set off and allot to said James B. Whittemore a certain lot on the southerly side of the Sixth Avenue in said city, distant above forty-five feet six inches from the corner of the Sixth Avenue and Eighth-street.

And the plaintiff further averred, that after making said partition, and before making any set-off as allotment to the said James B. Whittemore, said commissioners did admeasure and set off to said plaintiff as a security for her said dower from the said tenth part so allotted to the said James B. Whittemore all that piece of land above mentioned situated on the southerly side of Barrow-street extending to Fourth-street, aforesaid, with the buildings thereon; and which said property said plaintiff averred after the same was so admeasured, set-off, and assigned to her as aforesaid, she entered into possession thereof, and continued in possession thereof, receiving the rents and profits thereof as, and for her dower, under the said decretal order, and the said partition, allotment, and admeasurement of dower so made in pursuance thereof.

And plaintiff further averred, that subsequent to such allotment, and while she was in possession of said premises as, and for her dower, and dower house, receiving the rents thereof,

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and exercising every act of ownership therein of which said premises were capable, the said James B. Whittemore applied to her and requested her to release to him the said premises on Barrow-street, and offered as a consideration for such release, to convey to the said plaintiff other property of him, the said James B. Whittemore, as security for said dower. And the plaintiff said that upon such application she consented to release said property in Barrow-street to said James B. Whittemore, on the conditions, that he should convey to her other real estate which should have an equal annual value with said property to be released, and should be conveyed to said plaintiff, subject to the same conditions, and under the same liabilities as the said property in Barrow-street. That upon such understanding and promise on the part of said James B. Whittemore, said plaintiff did release to him said property in Barrow-street in consideration thereof, and as an equivalent therefor, as security for the plaintiff's dower, the said James B. Whittemore did on the 25th March, 1847, lease, and set over to said plaintiff, all that lot, piece, or parcel of land situate on the east side of the Sixth Avenue between Eighth-street and Waverly-place, in the fifteenth ward of said city of New-York, and known and distinguished on a map entitled map No. 3 of property belonging to the estate of Samuel Whittemore, deceased, in the ninth ward of said city, dated Jan. 26th, 1837, signed, Gardiner A. Sage, city surveyor, &c. Westerly in front by the Sixth Avenue, 22 feet and 9 inches. Easterly in the rear by land of Wm. Beach Lawrence, 22 feet and 9 inches. Northerly on one side by lot No. 2, on said map, 80 feet, and southerly on the other side by lot No. 4, on said map, 80 feet, together with the buildings and improvements thereon. To have and to hold the same for and during the term of her natural life, upon the same conditions as she held the premises discharged by her.

The plaintiff further averred, that she took possession of said last mentioned premises during the lifetime of said James B. Whittemore, and continued in possession of said premises ever since; and she averred that since the death of said James B.

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Whittemore, John D. Sloat, the defendant, claimed to be the owner of the said last mentioned premises, against the will and without the consent of the plaintiff, and had collected the rents thereof, and had withheld portions of the moneys received by him as the rent of said premises from the tenant thereof, from said plaintiff.

And plaintiff further averred, that the defendant, Joseph M. Stout, was then, and had been, in possession of the premises since the 1st day of May, 1852, as, and claiming to be, the tenant and holder of said premises under some lease or agreement made and executed by him and the said John D. Sloat, and which was then in possession of said Sloat; and averred that said Stout was indebted to her for the use and occupation of said premises for one quarter, in the sum of \$162.50, and that the said Stout had acknowledged himself to be indebted in said sum for the rent of said premises; but that said Sloat, as the plaintiff had been informed and believed, had threatened said Stout to commence an action against him in case he should pay said rent so due to said plaintiff, that said Stout although requested by said plaintiff, had refused, and still did refuse, to pay said rent or any part thereof; that she was informed and believed said premises were insured by said Sloat for the sum of \$2500, with a condition in the policy that in case of loss, the insurance money should be paid to said plaintiff; that before the expiration of said policy, said Sloat cancelled it and took out another, conditioned to pay the insurance, in case of loss, to him.

The plaintiff prayed judgment that said Sloat assign said lease and policy of insurance to said plaintiff; and an injunction restraining said Sloat from collecting or attempting to collect the rent of said premises from any person, and from exercising any acts of ownership over said premises; and for judgment against said Stout for \$162.50, and interest.

The answer was put in by defendant, John D. Sloat, only, and admitted the death of Samuel Whittemore; that he was seized and possessed of real and personal estate, leaving the plaintiff his widow, and ten children, whose names were cor-

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rectly stated in the complaint. Admitted the suit in partition, but denied on information and belief that the decree directed the commissioners to admeasure and lay off to the plaintiff, as widow, some part or portion of each and every one-tenth part, which part would be capable of yielding an annual income of at least \$400, &c., as stated in the complaint; but admitted that the commissioners made partition of said estate into ten parts, and did admeasure to the said widow some part or portion of each of said tenth parts as security for the dower of said plaintiff. Admitted the allotment of the premises to James Bayard Whittemore, one of the heirs, as stated in the complaint; but alleged that the said piece or parcel of land in Barrow-street was allotted and assigned to said James B. Whittemore, subject to the dower right or interest of said plaintiff to the extent of \$400, and that it was ordered that the same should be vested in said James B. Whittemore, to be held and enjoyed by him, his heirs, and assigns forever, subject to said dower right of \$400 per annum. Denied that plaintiff was in possession of said premises receiving the rents as and for her dower. Alleged that the premises in Sixth Avenue were vested in James B. Whittemore free and clear of all incumbrances and of the dower right of plaintiff. Admitted that plaintiff released the premises in Barrow-street to said James B. Whittemore; but alleged that the instrument in writing executed by said James B. Whittemore to plaintiff in consideration of such release was not a lease, but a mortgage or rent charge on said premises in Sixth Avenue to secure the payment of \$400 per annum to said plaintiff. Denied that plaintiff ever had possession of said last mentioned premises; but that they were rented and leased by said James Bayard Whittemore with the knowledge and acquiescence of plaintiff.

Alleged that defendant, Sloat, was the owner of said premises in Sixth Avenue, and derived title through the foreclosure of a mortgage upon said premises executed by said James B. Whittemore and wife to defendant; that said premises were sold at public auction Sept. 15th, 1851, subject only to the claim of \$400 per annum by the plaintiff; that defendant went

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immediately into possession, and thereafter and until about the time of the commencement of this suit received the rents and profits, and paid the taxes and assessments on said premises, and exercised acts of ownership therein, with the knowledge and assent of the plaintiff and her agent, Charles T. Whittemore.

Alleged that the execution of the lease of said premises to the defendant Stout, by defendant Sloat, was well known to plaintiff and her said agent, who acquiesced therein; that the rent (\$650 per annum) had been regularly paid by Stout to defendant Sloat until the 1st Aug. 1853, when plaintiff and her agent gave notice to said Stout not to pay the same to defendant; that the rent from that time remained unpaid.

Admitted that the premises were insured as stated in the complaint; and alleged that the amount secured to plaintiff by the instrument executed to her by said James B. Whittemore had been regularly paid to her or her agent, and receipts given by them, until Aug. 1, 1853; that defendant had tendered to plaintiff's agent \$100, all that was due plaintiff.

The instrument executed by James B. Whittemore to plaintiff, a copy of which was annexed to the complaint, recited that "in and by certain proceedings in the court of chancery for the partition of the estate of Samuel Whittemore, deceased, among his heirs a yearly rent or charge of \$400 was set off as dower to Jane H. Whittemore, widow of the said Samuel Whittemore, deceased, and the same made a specific lien upon the house and lot of land in the ninth ward of the city of New-York, on the southerly side of Barrow-street, as mentioned in said proceedings, and whereas also, the said Jane H. Whittemore has for my benefit and behoof released and discharged the said premises from the said lien and agreed to receive in lieu thereof as security for the said rent charge, the premises hereinafter mentioned.

Now know ye that I, James B. Whittemore, of the city of New-York, merchant, for and in consideration of the premises and also of one dollar to me in hand paid, do hereby demise, lease, and set over to the said Jane H. Whittemore and to her

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assigns, all that certain lot, piece or parcel of land, (describing the lot in the Sixth Avenue,) together with the buildings and improvements thereon, to have and to hold the same for, and during the term of her natural life, upon the same conditions as she held the premises mentioned as released and discharged by her."

THOS. W. TUCKER, *for Plaintiff.*

JOHN McKEON, *for Defendant Sloat.*

ROOSEVELT, Justice.—The court in this case is called upon, and it is no uncommon occurrence, to determine the meaning of parties who, it is apparent, had no definite meaning themselves; in other words, to find out by judicial exploration that which in reality never had any actual existence.

The plaintiff on the one hand claims that she was tenant in dower, and had possession of the premises allotted to her, as her "*estate in dower.*"

On the other hand, she alleges—for that clearly is the effect of the instrument annexed to her complaint—that a yearly rent or *charge* of \$400, a fixed sum, was set off to her, and made a specific *lien* upon the premises.

Dower, as an *estate* of the widow, implies possession in her; a rent charge, on the contrary, possession out of her. In the latter case, she would be the receiver of rent, in the former, herself the occupant. Two such contradictory attitudes—whatever efforts may be made to reconcile them—are inconsistent with each other. The plaintiff herself—seemingly sensible of the difficulty—has made her election between them. She allowed her son, which could not have been done if he were merely a reversioner after her death, to make leases in his own name, assigning them to her "as security." She subsequently, also, further ratified the possession of her son, or rather of Cornelius Sloat, her son's representative—by accepting from him \$100, and giving for it a written receipt, as for "one quarter's dower rent of house No. 90 Sixth Avenue, to August 1st, 1852."

It is a well settled rule—and a wise one—that where the

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language of an instrument is dubious, the acts of the parties may be resorted to, especially their contemporaneous acts, to ascertain their meaning. Applying this rule, we must consider the plaintiff's interest as a lien on, and not an estate in, the premises. And as the remedy by distress for all kinds of rent is abolished, a rent charge becomes, in effect, a mere annuity, secured, (without a bond,) like any other mortgage, payable by instalments, and with the right, in default of payment, to take possession of the mortgaged premises.

As the heir stipulated to be at the expense of repairs, he is also bound to insure, and to assign the policy as security; or the widow may do it herself, and charge the premium as part of the instalment to be paid.

A decree should therefore be entered—which the counsel will draw and submit for that purpose—declaring the rights of the widow as above explained, and directing an assignment to her of the insurance, and further providing that in case any instalment of her annuity shall at any time be in arrear and unpaid, for the space of thirty days, she shall be let into the possession and receipt of the rents and profits of the premises, paying herself thereout, and rendering the surplus, after the satisfaction of taxes, assessments, insurance, and repairs, to the defendant, John D. Sloat, or his representatives, or assigns.

No costs allowed to either party as against the other.

SUPREME COURT.

**SPIER, KINNICUTT, AND OTHERS, agt. ROBINSON, GREENFIELD,
AND ANOTHER.**

A *devisee*, claiming a specific performance of a contract for and the rents and profits of certain premises devised to him, in a supplemental complaint, is not bound to make the heirs at law parties plaintiffs. Nor is he bound to make them parties defendants unless the validity of the will is to be questioned.

Where the plaintiffs in the original bill might have been entitled to an account

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of the rents and profits, as prayed, on their death, the right to such account would vest exclusively in their personal representatives; but the personal representatives could not unite with the heirs at law or the devisees of the real estate as plaintiffs in a supplemental complaint for such account accruing prior to the death of the original plaintiffs.

A claim for a specific performance of an alleged contract to convey real estate, and for payment of a reasonable sum for the use and possession thereof, is not setting up two distinct causes of action which can not be legally united.

Where the object of a supplemental complaint is to revive a former action and to proceed in that action against the same defendants, a demurrer alleging that it does not state facts sufficient to constitute a cause of action will not lie, because it is not intended to state facts constituting a cause of action.

If the plaintiff alleges in a supplemental complaint that he is the devisee of all the interest which his father had in the subject of the suit, the defendants are at liberty to put that fact in issue; but if they *demur*, because the plaintiff does not show that the will was properly executed and proved to give him an exclusive right to claim as devisee, they *admit the fact*.

All persons entitled to have a deed executed must join in the suit to compel the execution, and in the offer to perform the contract on their part.

Section 121 of the Code relates to actions which would thereafter abate, and not to actions which had abated before the 1st July, 1848.

Therefore a suit in equity which abated, by the death of the complainants, prior to July 1, 1848, must be decided under the Revised Statutes and the former practice of the court of chancery.

A *devisee* can obtain the benefit of a former suit only by an *original bill* in the nature of a bill of revivor. He can not revive the suit by a bill of revivor or by petition.

Saratoga Special Term, Feb. 1854. The original bill was filed by Joseph Spier and John Kinnicutt against Issachar Robinson and Richard Greenfield, in order to compel Issachar Robinson to convey to the said Joseph Spier and John Kinnicutt a certain piece of land situate in the town of Edinburgh in the county of Saratoga.

To show that the complainants in the original bill were entitled to the relief demanded, they alleged among other facts, that in May, 1824, the said Robinson by contract in writing agreed to convey to the said Greenfield the said piece of land for \$700, payable, \$100 in November, 1824, and the residue in three annual payments of \$200 each, with interest annually. That in March, 1835, the said Greenfield being largely indebted to them, and to pay a part of that indebtedness, he offered to convey to them the said piece of land, and informed them that \$50 or \$60 only remained due on the contract to the said Rob-

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inson. They informed the said Robinson of their intended purchase of the said piece of land, and inquired of him what sum was due upon the said contract, and he said \$100 remained unpaid on the contract, and did not pretend that there existed any legal or equitable objection to giving a deed for the said premises. Afterward the said Greenfield gave them a quit claim deed of the said land and assigned and set over to them all his interest in the said land and to the said agreement, and he then promised to give them the possession of the said land, and instead of doing that he surrendered the possession to the said Issachar Robinson. That he took possession, well knowing the arrangements which had been made between them and the said Greenfield. That soon after the said Robinson took possession, the complainants, or one of them, called on him and informed him of their agreement with the said Greenfield, and requested the said Robinson to give up the possession to them and receive the amount of purchase money from them then due upon the contract, which he refused to do, and pretended that there was at least the sum of \$250 due on the said contract; and they allege that all the purchase money had been paid except a sum not exceeding \$60.

That in March, 1886, they tendered him \$100, and demanded that he should execute to them a deed for the said land. That a deed had been prepared and tendered to him for execution, which he refused to execute or accept the money, alleging that more was due upon the contract. That the contract, when signed, was deposited with John Hamilton for safe keeping, and after the said Robinson got possession of the said land he obtained possession of the said contract, with a view to defraud the complainants, and he has refused to give them a copy of the said contract. The prayer in the original bill is, that the said Robinson may be compelled specifically to perform the said contract and account for the rents and profits of the said land since he had the possession thereof. The plaintiffs in October, 1853, filed what they call a supplemental complaint against the two original defendants and James M. Robinson, in which they refer to the original bill and to the contents

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thereof, and allege that Joseph Spier, one of the original plaintiffs, died in August, 1845, leaving children and grand-children, who are plaintiffs in the supplemental complaint as his heirs at law. That John Kinnicutt died in the month of October, 1847, and by his last will devised all his interest in the said land to the plaintiff Benjamin S. Kinnicutt, his son. That in April, 1848, the said Issachar Robinson conveyed the said land to James M. Robinson, who at the time he took the conveyance knew of the proceedings in the original action and of the plaintiffs' rights under the contract therein set forth. That the said James took possession of the said land and still occupies the same. The plaintiffs allege that, at a special term of this court held in September, 1853, by an order of the said court, the plaintiffs were allowed to file the supplemental complaint. The plaintiffs, in the supplemental complaint, demand judgment against the defendants according to the prayer of the original bill, and that the defendant James M. Robinson may answer the original bill of complaint and the supplemental complaint, and that he be adjudged to convey the said premises to the plaintiffs upon their fulfilling the terms and conditions of the said agreements on their part, which they offer to do. Issachar Robinson and Richard Greenfield, two of the defendant's, have demurred to the supplemental complaint, and assigned four causes of demurrer, and the last cause is subdivided into five parts.

D. P. COREY, for Defendants on demurrer.

CHAS. CRAMER, Opposed.

CADY, Justice. The first cause of demurrer assigned is "that there is a defect of parties plaintiffs. The heirs at law of John Kinnicutt should be joined as plaintiffs." One answer to this objection is, that it does not appear that he had any heirs other than the plaintiff Benjamin S. Kinnicutt, his son, and who claims as devisee; and if John Kinnicutt had any other heirs at law, there was no necessity that they should be plaintiffs. They might have been made defendants if the validity of the will was to be questioned. The devisee was not bound to join the heirs at law with himself as plaintiffs. The second cause of demurrer

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assigned is, "That the personal representatives of the original complainants should be plaintiffs." For what reason? By the original bill a conveyance of real estate was demanded, and an account of the rents and profits after Issachar Robinson took possession. Although the original complainants might have been entitled to such account, on their death the right to such account would vest exclusively in their personal representatives, but the personal representatives could not unite with the heirs at law or the devisees of the real estate as plaintiffs. The plaintiffs can not have an account of the rents and profits which accrued before the death of the original plaintiffs.

The third cause of demurrer is, "That several causes of action have been improperly united in said complaint. It claims a specific performance of an alleged contract to convey real estate, and account and payment for the use and occupation of the same real estate by all the defendants," &c. This is not the claim. The demand is, that Issachar Robinson should pay a reasonable sum for the use and possession of the premises since he was put into possession thereof by the said Greenfield. This was not setting up two distinct causes of action. If Issachar Robinson wrongfully kept possession and refused to give a deed, justice required that he should give a deed and pay for the rents and profits. This was not setting up two distinct causes of action, which could not be legally united, but merely a specification of what he ought to do to make full compensation for the wrong done by him. A bill in equity could not be demurred to because the complainants demanded too many kinds of relief. The plaintiffs in the supplemental complaint can have no claim to the rents and profits which accrued in the life time of their ancestor and testator.

The fourth cause of demurrer is, "That the complaint does not state facts sufficient to constitute a cause of action." If the demurrer is understood to extend to the original bill, then an objection to the demurrer is, that some defendants who now demur have answered the original and can not now demur to it. If the demurrer be confined to the supplemental complaint, then an answer to the demurrer is, that as to them it was not

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intended to state facts constituting a cause of action. As to them the only object is to revive the former action, and to proceed in that action.

It may be necessary to examine the five specifications which have been named under the fourth cause assigned for demurrer.

First. "It does not state the necessary facts to entitle these plaintiffs to revive or continue the original action by a supplemental complaint, as attempted in this case." Two specifications are made, as I understand them, in support of the general proposition. It does not show that the plaintiffs have such a joint interest and right to the subject matter of the action as to authorize them to join as plaintiffs in a supplemental complaint to revive and continue the action attempted in this case. If the plaintiffs have any right to compel any one of the defendants to give a deed, it is a joint right, and one can not maintain the action without the other. Whether they can jointly have a remedy by the supplemental complaint in this case is a different question.

Second. "It does not show that the alleged will of John Kinnicutt was properly executed and proved, as a will of real estate, so as to give the alleged devisee an undisputed and exclusive right and title to the claim and interest in the subject matter of the original action." The plaintiffs have united in the allegation that Benjamin S. Kinnicutt is the devisee of all the interest which John Kinnicutt had in the subject of the suit. The defendants are at liberty to put that fact in issue. By demurring, the defendants have admitted that Benjamin S. Kinnicutt is devisee, as alleged in the complaint.

Third. "It does not show that the alleged will of John Kinnicutt was properly executed and proved, as a will of real estate, so as to give the alleged devisee an undisputed and exclusive right and title to the subject matter of the action." It could not be so executed and proved as to prevent the defendants disputing it if they chose.

Fourth. "The heirs at law of Joseph Spier deceased might proceed by a simple revival of the original action, and then bring James M. Robinson before the court, if necessary, by a

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supplemental complaint." The defendant Issachar Robinson and James M. Robinson could not be compelled to execute the contract in moities. All persons entitled to have the deed executed must join in the suit to compel an execution of the deed and in the offer to perform the contract on their part. The heirs of Joseph Spier can not entitle themselves to a deed for the whole of the premises by an offer to perform the contract on their part.

The fifth specification under the fourth cause of demurrer is, "Benjamin S. Kinnicutt, the alleged devisee, can only obtain the benefit of the proceedings in the original suit by an original bill or complaint in the nature of a bill of revivor and supplement." This objection is the most important one which has been made, and perhaps the only one which it is necessary to examine.

From the supplemental complaint it may be inferred that the plaintiffs supposed that their case was provided for by the 121st section of the Code, by which it is enacted that no action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterward, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest the action *shall* be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. This section, by the amendment of the Code, was made applicable to civil suits pending on the first day of July, 1848. This action, by the death of both complainants, had abated before the first day of July, 1848, and the conveyance from Issachar Robinson to James M. Robinson was made before that day. The section relates to actions which would thereafter abate and not to actions which had abated before the day last mentioned. With this action the 121st section of the Code has nothing to do. *Vrooman agt. Jones*, (5 *How. Pr. R.* 369.) It was held that section 121 of the Code did not authorize an action of ejectment to be re-

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vived against a party who purchased the land in dispute before the Code took effect. This case must be decided without any reference to the Code. It must depend upon the Revised Statutes and the former practice of the court of chancery. The supplemental complaint in this case resembles a supplemental bill much more than it does a bill of revivor. In *Cooper's Pleading*, 70, it is said that a bill of revivor must charge that the cause ought to be revived and stand in the same condition with respect to the parties to the original, as at the time the abatement happened, and it must pray that the suit may be revived accordingly. No such allegations are contained in the supplemental complaint in this cause.

Benjamin S. Kinnicutt does not claim as heir at law, but as devisee. He could not revive the suit by a bill of revivor or by petition under the practice of the court of chancery, or by virtue of 2 R. S. 184, § 115. (1 *Barb. Ch. Pr.* 681, 682.) A devisee, a purchaser, or an assignee, can not bring a bill of revivor, nor have such a bill brought against him; but if a devisee wishes to continue a suit he must file an original bill in the nature of a bill of revivor, (2 *Maddock's Chancery*, 400 and 401, and cases there cited; Wilder agt. Keeler, 3 *Paige*, 164; *Mitford's Pleadings*, 66-74.) A devisee can obtain the benefit of a former suit only by an original bill in the nature of a bill of revivor. In such a bill the complainants in this suit might have united.

I am therefore of opinion that the demurrer be allowed, with leave to the plaintiffs to amend on the payment of costs.

SUPREME COURT.

SIPPERLY agt. WARNER.

A cause is "necessarily" on the calendar, (§ 307, sub. 8,) when it is ready for trial, and regularly put there by the party noticing it.

Where a cause, before being reached on the calendar at the circuit, is referred

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or postponed by stipulation or consent of the respective attorneys, the successful party is entitled to tax \$10 costs for that circuit.

But where the successful party, against the consent of the other, procures a reference or postponement, he is not entitled to such fee.

Albany Special Term, Jan. 1854. Appeal from taxation of costs.

The action being at issue was noticed for trial at the circuit held in Albany, in June, 1853. After the commencement of the circuit and before the cause was reached upon the calendar it was referred by consent of the attorneys for the parties. The plaintiff having obtained a report in his favor, claimed, upon the taxation of his costs, to be allowed a fee of \$10 for the June circuit. This item was objected to, and disallowed by the clerk. The plaintiff moved for a retaxation.

MARTIN I. TOWNSEND, *for Plaintiff.*

T. C. SEARS, *for Defendant.*

HARRIS, Justice. I think the fee in question should have been allowed to the plaintiff. The cause was "*necessarily*" on the calendar, for by the term "*necessarily*," I suppose nothing more is intended than that the cause should be *regularly* or *properly* upon the calendar. In other words, the cause is *necessarily* on the calendar, when, being at issue and in readiness for trial, the party who has noticed it for trial has put it on the calendar for the purpose of trying it, if he has an opportunity.

The cause was also *postponed*. It is true that the order which had the effect to postpone the trial was entered by the consent of the parties, yet it is not the less true that the cause was *postponed*. I concur in the decisions which hold that where a cause, being on the calendar, is postponed upon the application of one party, against the will of the other, the party obtaining the postponement shall not afterward be allowed a fee for attending that circuit. It would be obviously unjust to allow a party who had been successful in the action to charge the unsuccessful party his costs for attending a circuit, after having himself prevented the cause from being tried

Larson, Appellant, agt. Wallace, Respondent.

at such circuit. There is nothing in the provision of the Code upon this subject which requires such a construction.

It was upon this distinction that the decision in *Perry agt. Livingston* (6 *How.* 404) was founded. The cause was upon the calendar for trial. It was referred, upon motion of the defendants, and against the objection of the plaintiff. The defendants having succeeded upon the trial, sought to charge the plaintiff with the costs of the circuit at which the cause had been thus postponed at the instance of the defendants, and against the plaintiff's will. It was properly held, that this could not be done. *Hinman agt. Bergen* (3 *Code R.* 225) is to the same effect. On the other hand, in *Burton agt. Sheldon*, (1 *Code R.* 134,) where, as in this case, the cause being on the calendar, was referred by stipulation, it was held, that the successful party was entitled to tax a fee of \$10 for the circuit at which the cause was thus postponed. An order must be entered directing the clerk to amend the entry of costs in the judgment by adding the item thus improperly rejected.

COURT OF APPEALS.

LARSON, Appellant, agt. WALLACE, Respondent.

Where a judgment is affirmed by default, it is too late to move to open the default, after the remittitur has been filed in the court below.

The object of the seventeenth rule was to give the appellant time to make the application before the filing of the remittitur.

June Term, 1854. This was a motion to open a default taken at the last March term.

The appellant, who appeared in person, showed by affidavit that, in consequence of illness in his family requiring his attendance at home, he had been unable to attend the March Term. The delay, however, was not very satisfactorily accounted for, and it appeared that the taxation of costs had been

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adjourned in the court below from the 5th till the 12th of May.

LEWIS BENEDICT, JR., *for Appellant.*

JOSHUA COIT, *for Respondent.*

By the Court—PARKER, J. The appellant shows an excuse which could perhaps be received as sufficient to entitle him to open the default on terms, if the cause was still within our control. But the application comes too late. The default was taken on the 8th of April last, and notice thereof was served personally on the appellant on the 10th day of April. The remittitur was received by the attorney for respondent on the 5th day of May and filed with the clerk of the superior court on the 12th day of May. On the filing of the remittitur in the court below, this court loses jurisdiction of the cause. (Martin agt. Wilson, 1 *Comst. Rep.* 240; Burckle agt. Luce, *id.* 239.)

The 17th rule of this court, (2 *Comst. R.* 576,) requiring a delay of ten days after service of notice of the default before the sending out of the remittitur, was intended to protect the party against surprise and to give him ample time to make his application for relief, or to obtain an order staying proceedings to enable him to do so. The appellant has neglected the opportunity to avail himself of the benefit of the time thus given, and this court has surrendered to the court below all control over the cause.

The motion must be denied, with \$10 costs.

SUPREME COURT.

HOLBROOK agt. WATERS.

Defendant bound himself with plaintiff, by agreement in writing, in consideration of \$500, not to practice medicine nor in any manner to do business as a physician in the county of Oswego, at any time after the first day of May, 1861. *Held*, good.

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Because, 1st. It was *partial* and not a *general* restraint. It would have been otherwise if the limits had embraced the state.

2d. The *consideration* was adequate to uphold the contract.

And, 3d. It was not an *unreasonable* restriction.

Oswego Special Term, June, 1854. The complaint avers, in substance, that in November, 1850, the plaintiff purchased of defendant, who was and had been for a number of years a practicing physician in Fulton, Oswego county, and its vicinity, a house and lot owned by defendant in that village, some office furniture, and his ride and good will; he agreeing to pay for the house and lot the sum of \$1,000, and for the furniture and good will the sum of \$500; in consideration whereof the defendant agreed not to practice medicine nor in any manner to do business as a physician in the county of Oswego at any time after the 1st day of May, 1851. The complaint then alleges that on the 1st day of January, 1854, the defendant returned to the village of Fulton and commenced again the practice of medicine in the county of Oswego, and continues thus to practice in violation of his agreement, and it asks that he may be restrained from thus practicing, and demands other relief in the premises. The demurrer interposed to this complaint takes the ground that the agreement of defendant not to practice in Oswego county is unreasonable, and in restraint of trade, and against public policy, and is therefore void.

R. H. TYLER, *for Plaintiff.*

MR. CURTIS, *for Defendant.*

BACON, Justice. The important question raised by the demurrer in this case, and the only one I propose to discuss concerns the validity of that clause in the contract between the parties which operates as a restraint upon the defendant from practicing as a physician in the county of Oswego.

That an agreement in general restraint of trade is utterly void was decided at least a century and a half ago, and has been the unquestionable law ever since; but the very case which settled this doctrine irrevocably, also held that a promise to restrain one's self from trading in a particular place, or within a lim-

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ited district, if made upon reasonable consideration, is good. (Mitchel agt. Reynolds, 1 *P. Wms.* 181.) The only inquiries to be made, therefore, to determine the validity of a contract restraining the exercise of a trade or profession, are, *first*, whether the restraint is *partial*; *second*, whether it is upon an *adequate* or merely colorable consideration; and, *third*, whether it is *reasonable*. Without attempting to exhaust the learning upon this topic with which the books abound, I propose to examine very briefly the contract in this case, in view of these principles and by the light of a few authorities bearing upon them. And in the first place the restraint imposed in this case is doubtless a *partial* one. A general restraint is in England defined to be one which forbids a person from employing his talents, industry, or capital, in any undertaking *within the kingdom*; but individual interest and general convenience render engagements not to carry on a trade or act in a profession in a particular place proper. (*Per* BEST, J., in Homer agt. Ashford, 3 *Bing.* 828.) Such special restraints as to places and districts of country have been frequently upheld in England and in this country, as we shall see more particularly when we come to the consideration of the reasonableness of the restraints which are sought to be upheld. In this country, therefore, it may perhaps safely be assumed that, by analogy, any restraint that embraced within its scope the territory of a state would be general and therefore void; while a local and limited territorial restraint is partial, and if not unreasonable is valid.

Second. As to the adequacy of the consideration, the cases are somewhat conflicting, and it is difficult to extract any very definite rule upon the subject. In the course of the argument of the case of Hitchcock agt. Cooker (6 *Ad. & El.* 488) ALDERSON observed that "if the consideration were so small as to be colorable the agreement would be bad;" while in Leghton agt. Wales (8 *M. & W.* 551) PARKE remarked that, "Since the case of Hitchcock agt. Cooker the court can not inquire into the extent or adequacy of the consideration. In the case in 8 *Mass.* 223, the pecuniary consideration of one dollar was held to be sufficient to uphold the contract. Smith, in his leading cases,

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says that the doctrine as to the adequacy of the consideration has been entirely upset by the case of Hitchcock agt. Cooker, and that the true question is, whether the contract is injurious to the public or not; if it be, it is void; if it be not, the parties may contract for what consideration they please. (1 Sm. Lead. Cases, 183.) Without discussing this point further, it is sufficient that in this case the consideration, being the sum of \$500, appears to be entirely adequate to support the contract, if it is not obnoxious to any other objection.

This brings me to the last inquiry, to wit, whether the restraint is *reasonable*. On this point it is more difficult still to lay down any precise rule, and in truth every case must be determined substantially upon its own facts and circumstances. In Brown agt. Gay (4 East. 190) a lawyer restrained himself from practicing in London and within a circuit of 150 miles from it, and this was held not to be an unreasonable restraint. In Denis agt. Mason (5 Term Rep. 118) a surgeon restrained himself from practicing within ten miles of the plaintiff's residence, and this was upheld. On the other hand, in Homer agt. Graves, (7 Bing. 748,) an agreement that a surgeon dentist would not practice within 100 miles of York was held void, on the ground that the distance was unreasonable; and in Lawrence agt. Ridder (11 Barb. S. C. R. 641) a restriction which embraced all the state of New-York west of Albany was held void as covering too extensive a territory. In Proctor agt. Sargent (2 Mann. & Gr. 20) an agreement not to sell milk within five miles of Northampton square was held reasonable. So in Noble agt. Bates, (7 Cow. 307,) an agreement not to carry on a trade within 20 miles of plaintiff's residence was sustained as not unreasonable; and in Parkins agt. Lyman (9 Mass. 522) a contract not to trade from Boston with the northwest coast of America for seven years was held unobjectionable. Without further citation, these cases are sufficient to show, that while no precise rule can be laid down, the general tenor of the decisions is such as to allow, if not the "largest liberty," yet a pretty liberal scope to these contracts, both in respect to extent of territory and the amount of population embraced within the designated

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limits of the restriction, and the tendency of the modern decisions is in this direction. (*Per* BRONSON, 21 *Wend.* 160.) The nearest approximation to a satisfactory rule that I have found is that laid down in the case in 6 *Ad. & El.* 438, that "where the restraint of a party is larger and wider than the protection of the party with whom the contract is made *can possibly require*, such restraint must be considered unreasonable and the contract void." And Lord KENYON, in 5 *Term Rep.* 120, remarking upon the objection that the limits were too extensive, says: "I do not see that they are *unnecessarily unreasonable*, nor do I know how to draw the line. Nor," he adds, "are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practice within the prescribed limits." Taking the cases cited and the above remarks as shadowing forth a principle applicable to this case, I am unable to say that the county of Oswego, either as to extent of territory or the amount of its population, constitutes so wide a field as to make the restriction which the defendant imposed upon himself by his contract in this case an unreasonable one. A fair consideration was paid by the plaintiff for the privilege purchased by him, and I can not say that the restraint is larger or wider than his protection may possibly require.

The result, therefore, is, that there must be judgment for the plaintiff on the demurrer, with leave to the defendant to answer on payment of costs.

SUPREME COURT.

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AND OTHERS.

It is not necessary, nor does section 308 of the Code require, that an application for an *extra allowance* should be made at the *trial* of the cause. It may be made subsequently; but must be made before the same judge who tried the cause. (*See Osborne agt. Betts*, 8 *How.* 31.)

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In an action where plaintiffs claimed \$1,000 damages of the defendants, trustees of a school district, for levying upon and taking personal property for school tax, in which action the plaintiffs were non-suited.

Held, that the *extra allowance* to the defendants should not be governed by the amount of damages claimed in the complaint, but by the value of the property proved on the trial to have been taken, (\$281.)

Washington Special Term, Sept. 1853. Application for an extra allowance of costs.

The cause was tried at the Washington circuit in February, 1853, before C. L. ALLEN, Justice. It was an action for the recovery of damages for levying upon and seizing personal property for a school tax in the district of which defendants were trustees. It appeared on the trial, that the tax collected and paid by plaintiffs amounted to \$203.25; but the plaintiffs claimed in their complaint \$1,000 damages. It was proved that the property levied on amounted in value to \$281, and that plaintiffs paid the tax and stopped the sale, and claimed the amount they paid, on the trial. The plaintiffs were non-suited, and the defendants now apply for an extra allowance of ten per cent. on the whole amount claimed in the complaint.

WAIT & PARRY, *for Defendants.*

W. L. F. WARREN, *for Plaintiffs.*

C. L. ALLEN, Justice. It is objected that this application should have been made at the *trial* of the cause, and that it is *too late* to make it now. In the case of Osborne agt. Betts, (8 How. 31,) Justice PARKER remarks that the application can only be made under rule 82 to the court before whom the trial is had, or the judgment rendered. He adds, that it was intended by the rule that the question of extra allowance should be determined by the judge who tried the cause, who necessarily must be most competent from his knowledge of its character to decide upon the propriety of the application and the extent to which the allowance should be made, and to prevent the abuses which had been practiced of attorneys seeking a judge who might be more favorable to their demands.

I know, the learned judge remarks in that case, that the replication must be made at the circuit or court at which the

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cause was tried, and cites Dyckman agt. McDonald, (5 *How.* 121.) But in that case, Justice BARCULO, who delivered the opinion, does not so decide; he says, "the application should have been made at the circuit when the cause was tried; or, *at all events, before the judge who held the circuit,*" intimating that if made before the judge who tried the cause, it might be made subsequently to the trial; and such has been my understanding of the practice. It accords, in my judgment, with the spirit and intention of rule 82, and is sanctioned by Justice HAND in the case of Mann agt. Tyler, (7 *How.* 235,) where he says, that there is no objection to entertaining the application at the time of the trial without a formal notice, if the same judge is then holding a special term. "But if not made *then*, notice should be given as in other cases." The 308th section does not require the application to be made at the *trial*, nor do I deem it necessary.

It is argued, that the jury should have found the value of the property. It was proved that the value was \$281. This, I think, is sufficient for the court to act upon, and should govern in fixing the amount of the allowance, rather than the amount claimed in the complaint. The action was against public officers. The trial was an important one, involving the regularity of the defendants' proceedings and the proceedings of the inhabitants of a school district in voting taxes and issuing warrants for the collection thereof. It was difficult and extraordinary, and within many of the cases decided on this question; and I shall order an extra allowance of \$25, but without costs of this motion, as none are asked for in the notice.

Strauss agt. Parker.

SUPREME COURT.

STRAUSS agt. PARKER.

A defective *verification* furnishes no ground for setting aside the pleading. If the verification of a pleading is deemed insufficient, the opposite party may test that question by omitting to verify his answer to it.

Nor can an entire complaint be set aside on an allegation that several causes of action therein are not separately stated, (*Code*, § 167.) The defendant may *demur*, and allege for cause of demurrer, that several causes of action have been improperly united. (*See Wood agt. Anthony, ante p. 78; Gooding agt. McAllister, ante p. 123, the latter adverse.*)

Where the complaint is not numbered as required by the 87th rule, the proper practice, in this and all other cases where the defect is merely formal, is to return the pleading after pointing out the defect. If this is not done within a reasonable time, the irregularity is waived.

Albany Special Term, Jan. 1854. Motion to set aside complaint.

The complaint states that the defendant is indebted to the plaintiff in the sum of \$25.50, "for goods, wares, and merchandise sold and delivered, and bargained and sold, and also for a balance due on settlement of accounts for said goods sold as aforesaid." After stating this cause of action, the complaint proceeds to set forth separately *eight* other causes of action assigned to the plaintiff by *eight* different creditors of the defendant. The defendant moved to set aside the complaint "on the ground that it contains several causes of action, and that the same are not separately stated and plainly numbered, and that the verification of the complaint is imperfect and insufficient."

D. K. OLNEY, *for Plaintiff.*

J. K. PORTER, *for Defendant.*

HARRIS, Justice. In respect to the verification, it is enough to say that, if the defendant's attorney deems it insufficient, he may test the question by omitting to verify his answer. This he has a right to do, if the complaint has not been verified in the manner prescribed by the Code. But a defective verification furnishes no ground for setting aside the pleading.

St. John, Receiver, agt. Denison.

So, too, if the plaintiff has failed to comply with the requirements of the 167th section of the Code, by stating the several causes of action which it contains *separately*, the defendant may demur to the complaint and allege for cause of demurrer, that several causes of action have been improperly united. Getty agt. The Hudson River Railroad Co. (8 *How.* 177.) But the entire complaint cannot be set aside upon that ground.

The complaint is not numbered, as required by the 87th rule. But the defendant's attorney is mistaken in supposing that a pleading is to be set aside for this defect. The proper practice in this, and all other cases where the defect is merely formal, is, to return the pleading, and at the same time point out the defect. (White agt. Cummings, 3 *Sand.* 716; Levi agt. Jackeways, 4 *How.* 126.) If this be not done within a reasonable time, it will be held that the irregularity has been waived. I know that in Blanchard agt. Strait, (8 *How.* 83,) it was stated as one of the grounds upon which the complaint was set aside, that the causes of action had not been numbered in compliance with the 87th rule. But the decision was abundantly sustained upon other grounds, and the former practice in relation to formal defects in pleadings is certainly more reasonable, as well as convenient, and should be retained.

The motion must, therefore, be denied, but I think it should be without costs.

SUPREME COURT.

St. John, Receiver, agt. Denison.

Where a plaintiff, as *receiver*, prosecutes an action in good faith, he is not liable for costs for not proceeding to trial where a good reason is shown for not trying in pursuance of a notice or stipulation.

A receiver, in such case, stands on the same footing as an executor or administrator prosecuting in behalf of an estate.

Oswego Special Term, June, 1854. This is an application by defendant for costs against the plaintiff for not proceeding to trial pursuant to a notice to that effect.

St. John, Receiver, agt. Denison.

The plaintiff was appointed a receiver of the property and effects of Robert Gifford, a judgment debtor, by an order of the county judge of Oswego county. By a further order of the judge he was authorized and directed, as such receiver, to prosecute this suit. He commenced it accordingly, and, as appears by the affidavits in opposition to the motion now made for costs against him, noticed it in good faith for trial, but was prevented from proceeding to trial by the absence of a material and necessary witness.

A. P. GRANT, *for Motion.*

N. L. TOWNSEND, *Opposed.*

BACON, Justice. A receiver under such circumstances is the officer of the court and comes within the same protection, and is in my judgment entitled to the same indulgence, as an executor or administrator prosecuting on behalf of an estate. Such parties prosecuting in good faith are exempt from costs for not proceeding to trial where a good reason is shown for not trying pursuant to notice or stipulation. (Purdy agt. Purdy, 5 Cow. 14.) And in Reeder agt. Seely (4 Cow. 548) it is decided that one who sues, *en autre droit*, in good faith, though without proper ground, may discontinue without costs. That was the case of an assignee of an insolvent debtor. See also Phenix agt. Hill, (3 Johns. 249.) The doctrine of these cases is decisive against the application of the defendant in this suit, for costs against the plaintiff for not proceeding to trial; but as the point has not been expressly adjudicated in the case of a receiver, and as there was a *prima facie* ground for the application, the motion is denied without costs.

SUPREME COURT.

BROWN, Survivor, &c., agt. HEACOCK.

An *appeal* can not be dismissed on motion, on the ground that a *case* or *exceptions* have not been served in time.

The party may rely in his appeal upon matters appearing on the face of the record.

Sixth District General Term, January, 1854. This is a motion made by the plaintiff to dismiss the defendant's appeal from a judgment entered for the plaintiff on the 17th day of June, 1853, on the report of a referee. Notice of the judgment was served by the plaintiff's attorneys by depositing the letter in the post-office at Elmira on the 17th day of June, 1853, directed to the defendant's attorney at Buffalo, and paying the postage thereon. The letter was in fact postmarked at Elmira, June 18th, as appears by defendant's affidavit.

On the 8th day of July, 1853, the defendant's attorney deposited in the post-office at Buffalo a copy of exceptions, &c., directed to plaintiff's attorneys at Elmira and paid the postage thereon. This letter was post-marked on the 9th of July and was received on that day, as appears by plaintiff's affidavit.

The notice of appeal, undertaking, &c., were served on the 11th of July, 1853.

The motion to dismiss the appeal is founded on the want of a case or exceptions, the one proposed or sent not having been served in twenty days, agreeably to the Code.

SMITH & MURDOCK, *for Motion.*

S. LOVE, *Opposed.*

By the Court—SHANKLAND, Justice. This motion can not be sustained. Whether a case or exceptions were made and served in time, or not, affects not the regularity of the appeal. The appellant may appeal from a judgment whether he makes a case or exceptions, or not. He may on such appeal reverse the judgment for causes appearing on the face of the record;

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as, for instance, that the complaint does not state facts sufficient to constitute a cause of action. (Code, § 148.)

The appeal, in this case, was regular, according to the provisions of the Code, §§ 327, 332.

If the defendant has failed to make and serve, his case in season, or if he has failed to file it with the clerk within the time prescribed by rule 17, he is deemed to have abandoned it, and must either discontinue his appeal or go to argument on the judgment record alone. But the appeal is not lost by reason of the loss of his case or exceptions.

It is unnecessary to the decision of this motion to examine whether the case was deposited in the post-office at Buffalo in twenty days after service of the notice of judgment. If the defendant shall need relief, on account of laches, he must move for it, so that the plaintiff can meet the application by opposing affidavits, if he shall be so advised. This motion to dismiss the appeal is denied with ten dollars costs.

SUPREME COURT.

SEBRING, Executor, &c., agt. LANT.

An *injunction* can not be allowed, restraining a defendant from transferring or disposing of a *promissory note*, on a mere claim of indebtedness.

The plaintiff must not only establish a legal right in such a case, but must show the issuing and return of an execution unsatisfied.

Order to show cause why an injunction should not be granted restraining the defendant from transferring a certain promissory note.

JAMES S. COON, *for Plaintiff.*

WM. H. KING, *for Defendant.*

GIBSON, County Judge. By § 219 of the Code, there are three grounds on which an injunction may be granted, viz. :

1. Where it shall appear by the complaint that the plaintiff

is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff: or,

2. When during the litigation the defendant is doing, or threatens, or is about to do, or procure, or suffer some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction restraining such act may be issued, and,

3. Where, during the pendency of the action, the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, the same may be temporarily restrained.

It is clear that the injunction sought in the case under hearing cannot be granted under either of the two last provisions, as both of those are applicable only to acts done or threatened pending or during the litigation, while the sole cause for the injunction asked in this action is for what occurred anterior to its commencement. (4 *How.* 31; 5 *id.* 437; 6 *id.* 89; 7 *id.* 18.)

The question of practice raised on this application is one of great importance in a commercial and trading community; and if an injunction can be granted, will entirely subvert the former practice in regard to restraining parties from disposing of their property before judgment. By the former rules of the court of chancery, an injunction similar to the one claimed here could not be issued till the plaintiff had not only obtained judgment, but had an execution returned unsatisfied. These rules were founded in wisdom, and should not be subverted unless the intention to do so is clearly expressed in the Code. Mr. Justice PARKER in *Perkins* agt. Warren, (6 *How.* 346,) speaking of the section of the Code in question and the power to enjoin a defendant from interfering with, or disposing of his property, says: "Such an interference, if it could be permitted on a mere *claim* of indebtedness, would be greatly prejudicial to the commercial interests of the community. It has long been regarded

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as a cardinal principle, that the *legal* right of the plaintiff must be established before he can call to his aid the extraordinary power of a court of equity; and a writ of injunction could never be granted where there was doubt about the legal right. The law was still more careful in protecting a defendant from interference by an injunction that would suspend all his business operations; for in addition to establishing the legal right by the recovery of the judgment, it required the plaintiff first to make the attempt to collect his demand by execution."

Though the learned judge was discussing the right to enjoin under the third clause of § 219, yet the language and reasoning are quite as applicable to an application under the first clause, for if the one is commercially injurious, so is the other. And to the same effect is the language of Mr. Justice HAND in *Pomeroy* agt. *Hindmarsh*, (5 *How. Pr. R.* 438.) Within these principles, the injunction asked for should not be granted. The plaintiff has not established any legal right, and is not entitled to the equitable interference of the court till he does so, and not then till after the issue and return of execution unsatisfied.

It is urged that the plaintiff does not seek a *general* restraint of the defendant's property; but *non constat* that all his property is not invested in the note in question; the presumption would rather tend that way, *else* why restrain him from its transfer and disposition.

But aside from this, if the court cannot enjoin him from a general transfer they cannot from a part, as the power is not given in the one case any more than the other, and for the same reasons.

The order to show cause is therefore discharged.

Avery and others, Assignees, &c., agt. Smith and another, Administrators, &c.

SUPREME COURT.

**AVERY AND OTHERS, Assignees, &c., agt. SMITH AND ANOTHER
Administrators, &c.**

Where a claim against an estate had, in good faith, been referred under the Revised Statutes, (2 R. S. 89,) and a lengthy litigation ensued, on motion by the prevailing party for confirmation of the report and for costs—*held*, that under § 317 of the Code, no costs could be allowed. Fees of referees and witnesses and other necessary disbursements were all that could be had.

Washington Special Term, September, 1853. Motion to confirm report and for costs.

The plaintiffs, as assignees, &c., presented a claim to the defendants against their intestate. It was supposed by both parties that the estate was indebted to plaintiffs, but the amount could not be agreed upon and a reference was had under § 36, Title 3, Art. 2, Ch. 6 of 2d part of Revised Statutes, (2 R. S. 89.) On a hearing before the referees, which lasted two days, they reported that there was nothing due to plaintiffs as assignees, but that there was due from Reuben Sanford, their assignor, to the defendants, as administrators, the sum of \$18.13. Both parties have acted in perfect good faith, nor is there any complaint against the plaintiffs of any mismanagement on their part. The defendants apply for an order confirming the report and for costs.

FINCH & HARWOOD, for Plaintiffs.

B. POND, for Defendants.

C. L. ALLEN, Justice. It is proper that the defendants should make a motion to confirm the report in this case, and I should be inclined to grant them costs but for the amendment inserted in section 317 of the Code of 1851, 1852. Before that it had been decided that such a proceeding was a suit at law, and that costs could be allowed. But the insertion of the provision just alluded to alters the law. It is as follows: "*Whenever any claim against a deceased person shall be referred pursuant to the provisions of the Revised Statutes, the prevail-*

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ing party shall be entitled to recover the *fees of referees and witnesses, and other necessary disbursements*, to be taxed according to law." I think the intention was to exclude all other costs. The section, like many of its fellows, is somewhat dark and obscure, and although it is not at all times easy to bring light out of darkness, yet the small ray afforded by this phraseology in my judgment warrants this construction. Such was the conclusion in Van Sickler agt. Graham, (7 How. 208,) decided since the amendment. I am of opinion, therefore, that I can only allow items there mentioned.

There is no pretence here that plaintiffs have mismanaged or have acted in bad faith. They are clearly *assignees of an express trust*, within the meaning of the section.

The order, therefore, must be, to confirm the report, and for judgment, that the amount reported, with the fees of referees and witnesses, and other necessary disbursements, be collected out of the funds or estate of Reuben Sanford in the hands of the plaintiffs as his assignees.

SUPREME COURT.

CRUIKSHANK agt. CRUIKSHANK.

A claim against an estate of \$1,000 is not unreasonably resisted by the administrator where, on the trial, it has been reduced to \$350.

To entitle a party to costs of a trial against an estate, or an executor or administrator, on the ground that they refused to refer, it must appear that an *account* or *some claim* against the estate, which could be supported by vouchers and affidavits, was presented to the executor or administrator before refusal to refer. A general vague demand of a gross sum is not sufficient.

Onwego Special Term, June, 1854.

CHARLES H. DOOLITTLE, *for Motion.*

MR. COBURN, *Opposed.*

BACON, Justice. There are in the affidavits presented on this motion a good many conflicting statements, but in the view

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I take of the matter it will hardly be necessary to attempt to remodel them, were such a thing practicable. There are only two grounds upon which, in a suit against an executor or administrator, costs are recoverable, either personally or chargeable upon the estate. 1st. When the claim has been presented and it has been unreasonably resisted or neglected. 2d. When there has been a refusal to refer, the claim being disputed. (1 *Denio*, 276.) In this case the amount demanded was \$1,000, and the amount recovered was \$350. This shows that it was not unreasonably resisted. (Same case, and Comstock agt. Olmstead, 6 *How.* 77.)

But I am of opinion that the claim has never been presented to the administratrix in any such way as to require her to act and subject the estate to costs consequent upon its rejection and a refusal to refer. The statute contemplates the presentment of an account, or some claim which may be supported by vouchers, and, if required, by the affidavit of the party presenting it. (2 *R. S.* 152, § 38.) Nothing in the shape of a claim was presented at any time, but a general and vague demand for \$1,000, and the most that occurred on the subject of the demand and the negotiations in regard to it, was long before the defendant was appointed administratrix on the estate of the decedent. She was appointed administratrix on the 19th July, 1853. After this it is not claimed on the part of plaintiff that there was any presentment of a demand, or any thing in the nature of an account; but immediate application was made to an agent of the defendant to refer the plaintiff's claim. An opportunity was desired on behalf of the defendant to consult with counsel, which was assented to. The counsel for plaintiff swears that the next morning the agent saw him and declined to refer. This the agent denies, but avers that he was willing to refer if they could agree upon the proper parties. I think it fair to assume, however, that he was understood to decline a reference, for the attorney immediately and the same day (July 20) commenced the suit. In this I think the plaintiff was premature. I think a claim in the shape of an account of some kind should have been presented to the administratrix and duly demanded,

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and an opportunity have been given for its examination, unless it had been promptly and peremptorily rejected, before the estate was subjected to the penalty of costs for declining to refer. (See the case of Knapp agt. Cotes, 6 *Hill*, 886.)

The failure of the various attempts to arbitrate prior to the granting of letters of administration to defendant amounted to nothing. A party asking for costs against an executor or administrator must bring himself strictly within the statute. It is not enough to show that the administratrix refused to arbitrate. She must refuse to *refer*. (Swift agt. Blair, 12 *Wend.* 278.)

The motion is denied, but in consideration of all the circumstances shown by the affidavits it was not unreasonable to make the application, and it is therefore denied without costs.

SUPREME COURT.**VANDERBILT agt. THE ACCESSORY TRANSIT COMPANY.**

The plaintiff brought his action upon a contract made with defendants, and among other things, being the principal controversy, alleged that it was for the sale and delivery to the defendants of a large quantity of *residuary coal*, at cost, to be paid for by defendants and retained by plaintiff out of the first earnings of the ships sold by plaintiff to defendants; that the coal, coal hulks, and fixtures, were transferred and delivered to the company, and that their value amounted at cost to, and had been *liquidated between the parties* at \$180,706.58, and that \$70,040.59 still remains due and unpaid.

The answer averred that the entire allegation in the complaint "as to the contract between them and the plaintiff, excepting so far as the same relates to the purchase and sale of the vessels and the purchase and sale of the coal, coal hulks, and fixtures, is totally and without qualification untrue. It is true that defendants were to pay for the coal, hulks, &c., out of the first earnings of the ships, but plaintiff was not to retain that amount; and defendants have paid the same and more than the same to said plaintiff. For the coal, hulks, fixtures, &c., the defendants owe nothing."

It being claimed by plaintiff, under § 168 of the Code, that by the answer of defendants they had admitted the allegation in complaint, that \$70,040.59 was due—*Held*, that under § 160 the defendants might amend, upon terms, by making their answer more definite and certain.

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New-York Special Term, June, 1854. Motion to amend answer.

EDWARD SANDFORD, *for Motion.*

CHARLES O'CONOR, *Opposed.*

ROOSEVELT, Justice. The defendants, it is supposed, by a slip of the pleader, made an implied admission in their answer, involving consequences to the amount of seventy thousand dollars and upward, contrary, it is alleged, to their intention, and contrary to the truth of the case; and they now seek by amendment, on such terms as may be just, to restore themselves, as far as may be, to their original position.

The contract upon which the action was brought, among other things, was for the sale and delivery to the defendants of a large quantity of residuary coal, understood to be at the places of deposit on the Atlantic and Pacific coasts of the isthmus, where the steamships received their supplies. Of how many tons did this residuum consist, or rather, with how many tons are the company chargeable? is the main point in dispute. The steamships were sold to the company at a fixed price of \$1,350,000—the coal, “at cost,” to be paid for out of the first earnings of the ships—the plaintiff continuing in his new character of agent, instead of principal, to conduct the business of the line.

It is alleged for him in his complaint—for he himself was absent in Europe when it was filed—that the coals, &c., were “transferred and delivered to the company, and that their value amounted at cost to, and had been liquidated between the parties at \$180,706.58;” and that \$70,040.59 “still remains due and unpaid.”

The defendants in their answer—which seems to have been written with more passion than precision—“aver that the entire allegation in the complaint as to the contract between them and the plaintiff, excepting so far as the same relates to the purchase and sale of the vessels and the purchase and sale of the coal, coal hulks, and fixtures, is totally and without qualification untrue. It is true, (they continue,) that defendants were

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to pay for the coal, hulks, &c., out of the first earnings of the ships, but plaintiff was not to retain that amount; and defendants have paid the same and more than the same to said plaintiff." And they add "for the coal, hulks, fixtures, &c., the defendants owe nothing."

The question then is, do these expressions, taken together, contain or imply a denial that the coal account had been *liquidated* between the parties at the amount specified in the complaint, or rather, do they by the omission of any direct, specific response to the averment in that particular necessarily admit its truth.

By the 168th section of the Code, it is declared, that "every material allegation of the complaint, not controverted by the answer, as prescribed in section 149, shall, for the purposes of the action, be taken as true." Now the 149th section, thus referred to as defining the rule, does not require a specific, but a "general, or specific, denial of each material allegation of the complaint controverted by the defendant."

Can it then be said—trying the answers by this rule—that it does not in some sort controvert the allegation of an account stated. "It seems to me, with the extracts above quoted, that can hardly be said, especially by a court whose express duty it is made, in the interpretation of pleadings, to apply to them the most liberal principles of construction, with a view, not to the overthrow, but to the establishment of "substantial justice between the parties."

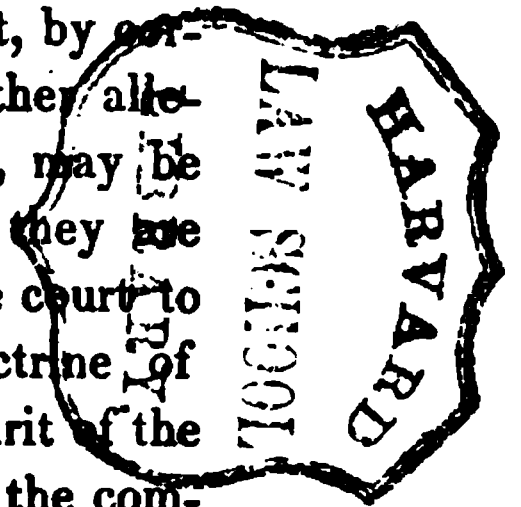
That the answer is deficient in precision, all can see, and even the defendant's counsel does not deny. We may even allow it to be doubtful, in some aspects of the argument, whether it does or does not contain even a general response to the important averment in question. That the averment, however, was not intended to be *admitted*, is positively sworn, and that it is not a *fact*, on this motion at least, is a just inference from the same affidavits. Can the court then, with propriety, let the pleadings remain in their present state? Will it conduce to substantial justice to superadd to the original controversy another, still more distressingly doubtful, as to the legal

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effect of the professional words in which that controversy is expressed?

When, says the Code, the allegations of a pleading, whether it be an answer or a complaint, "are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may (with or without the motion of counsel, in its own discretion) require the pleading to be made definite and certain by amendment." It seems to me this is precisely such a case. The plaintiff, it is true, insists that the time for amendment has gone by; and that, relying on the supposed admission, he has permitted two of his witnesses to depart the state without examination.

"In furtherance of justice," the law provides that amendments may be made, at any time, even after judgment, by correcting mistakes in any particular, or "by insisting on other allegations material to the case." Terms, it is true, may be imposed on the moving party, and in cases where they are "proper," it is the duty, as well as the right of the court to impose them. But, with this qualification, the doctrine of amendment is to be liberally applied. The whole spirit of the Code, and in that respect it is but an emanation of the common sense of modern times, demands such a course of procedure. And the constitution of the state, I may add, which, in effect requires little more of a practitioner than that he should be twenty-one years of age, greatly increases the necessity. Under this liberal, or perhaps it may be called latitudinarian system of legal education, occasions for amendment must frequently occur; and they must be met, of course, both by the legislature and the judiciary, in the same temper as that which actuated the framers of the instrument out of which, in some degree, they may be said to originate. Technical exactness, once the beau ideal of the legal pleader, can no longer be expected, and ought no longer to be required. Tidd and Chitty are obsolete. And the courts must be blind to defects and indulgent to amendments. Such, in my judgment, is the rule which the temper of the times and of the country—wisely too, as I believe, prescribes in these cases.



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The motion, therefore, of the defendants must be granted, but with this condition, that the amended answer shall be forthwith served, accompanied by the payment of all costs, including reasonable counsel fees, to be certified by one of the judges of the court, and with a written stipulation that the plaintiff on the trial may be a witness in his own behalf, without objection as to competency, and subject to the usual cross-examination.

SUPREME COURT.

MILLER agt. LOSEE.

Where the defendant in his answer sets forth a cause of action arising upon contract other than that which constitutes a set-off, the plaintiff may reply any facts which would have constituted a defence, had the defendant sued the plaintiff for such cause of action.

If the plaintiff brings his action upon a note, and the defendant states a cause of action constituting a set-off, and the plaintiff has another cause of action which would constitute a set-off to the defendant's claim, had the defendant brought an action upon the claim he set-off, the plaintiff may reply his other cause of action as a set-off and *defence* to the defendant's set-off; which, under § 153 of the Code, will constitute a *defence* to the new matter in the answer.

The court, under the present system of pleading, must take notice of *equitable set-offs* and *defences* as well as legal.

Erie Special Term, May, 1854. Action upon a note of \$80. The defendant denied all the allegations in the complaint, and then "for a further defence and counter claim," stated in his answer several set-offs; and also statements of facts constituting causes of action against the plaintiff, which would not be permitted as set-offs merely. These statements of facts constituting set-offs, and causes of action, were separately stated.

The plaintiff replied, denying all the allegations in the answer, and then "for a further reply and defence to the new matter contained in the defendant's answer," made statements

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of demands for, 1. Work and labor; 2. For goods, wares, and merchandize, sold and delivered; 3. For money lent and advanced, &c.; 4. For carrying and conveying divers goods, wares and merchandize for the defendant, and for the use of boats and vessels, &c.; and he alleged that there was due to him the sum of one thousand dollars for and on account of the claims and demands of the plaintiff against the defendant as therein stated, over and above all defence and counter claims which the defendant has against the plaintiff, and the note upon which the action is brought.

The defendant moved to strike out all the new matter in the reply, or to set that part of it aside.

T. C. WELCH, *for Defendant.*

AUGUSTUS FORD, *for Plaintiff.*

MARVIN, Justice. The answer of the defendant may contain, 2d, "a statement of any new matter constituting a *defence* or *counter claim*." (Code, § 149.) The defendant, in the present case, has set forth in his answer several separate statements of new matter, constituting, under the revised statutes, set-off; and also, separate statements of new matter constituting causes of action against the plaintiff upon contract, which are not authorized by the revised statutes as set-offs. These latter statements of new matter are authorized by the second subdivision of section 150 of the Code. This section defines a counter claim. It must arise out of one of the following causes of action. The 2d cause is: "In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." In the present case the action is upon a note, and the counter claims are upon special contracts made by the plaintiff with the defendant, and damages are claimed for the breach of the contracts.

By section 153, when the answer contains new matter constituting a counter claim, the plaintiff may reply to such new matter, denying each allegation controverted by him, and he may allege any new matter, not inconsistent with the complaint, constituting a *defence* to such new matter in the answer. It

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can hardly be argued that this provision does not authorize the plaintiff to allege in his reply any new matter which will constitute a defence to the cause of action set forth as a counter claim, and which did not constitute, under the revised statutes, a set-off. It is insisted, however, by the defendant's counsel that the plaintiff cannot reply a set-off to the set-off stated in his answer.

I can see no objection, under the Code, to the plaintiff's meeting the defendant's set-off in this manner. It may be conceded that the statutes, prior to the Code, did not authorize the plaintiff to reply a set-off to the plea of set-off by the defendant; but it does not follow that he may not do so now.

The present Code, touching pleadings in courts of record, does not use the term set-off, nor did the Code of 1848. The Code of 1848 used the term *defence* only; and I have no doubt, as the Code then stood, that a defendant might have availed himself of a set-off, and stated it as new matter, constituting a defence. By the amendments of 1849, the word "set-off" was inserted in section 149 after the word defence, probably to obviate any doubt. (See Ranney agt. Smith, 6 *How Pr. R.* 420; Willis agt. Taggard, 6 *How. Pr. R.* 433.)

By the amendments of 1852 the word "set-off" was omitted, and "counter claim" inserted, by which it was intended to include set-off, recoupment, and other causes of action as defined in section 150. The second subdivision of § 150, in connection with § 149, as we have seen, authorizes a defendant to state any other cause of action arising also on contract, and existing at the commencement of the action. Now this undoubtedly includes a set-off. He who has a set-off has a cause of action arising on contract. The provision, however, goes much further, and includes any cause of action arising on contract.

As above stated, it was my opinion that, as the Code of 1848 stood, with the word *defence* only, a defendant could avail himself of a *set-off*, or could recoup, because, as to the former, the revised statutes authorized a set-off, and the decisions of the courts constituting law, authorized recoupment, and they were

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defences within the meaning of that term as used in the Code. Some of the judges expressed the opinion that the word *defence*, as used in the Code, meant a *bar* to the action, and with this construction set-off and recoupment might have been excluded. As to the construction of the word "defence," as used in the Code, see Houghton agt. Townsend, 8 *How. P. R.* 441.

By the present Code, (§§ 149 and 150,) the defendant is authorized to insert in his answer new matters not before allowed. He may state any cause of action arising upon contract. It is called a counter claim, and by § 153 the plaintiff may reply to such new matter, and allege any new matter constituting a *defence* to such new matter in the answer. Here we have the word *defence* again. It is clear to my mind that when the defendant in his answer sets forth a cause of action arising upon contract,—other than that which constitutes a set-off,—the plaintiff may reply any facts which would have constituted a defence, had the defendant sued the plaintiff for such cause of action; and the only serious question that can be made, is whether he may reply a set-off to the set-off stated in the answer. Assuming that he was not, by statute, prior to the Code, permitted to do so, still I think that the Code now authorizes it. If the plaintiff, as in this case, brings his action upon a note, and the defendant states a cause of action constituting a set-off, and the plaintiff has another cause of action which would constitute a set-off to the defendant's claim, had the defendant brought an action upon the claim he has set-off, I think the plaintiff may reply his other cause of action as a set-off and *defence* to the defendant's set-off; and that in contemplation of section 153, it will constitute a *defence* to the new matter in the answer.

It may not be improper to add that courts of equity possessed and exercised jurisdiction touching set-offs, prior to any statutes upon the subject, and that although since the statutes relating to set-offs they have generally followed the statutes, still they have not been limited strictly by the provisions of the statutes as courts of law were; but they often gave relief in cases not provided for by the statutes. They had rules of

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their own, founded upon principles of equity. Now, so far as pleadings are concerned, we have but one system for administering law and equity, or rather for ascertaining the rights of parties, whether depending upon those principles known as legal or equitable. Would not a court of equity, in a case where the defendant had interposed a set-off to the complainant's demand, and the complainant had an account not embraced in his bill; sufficient to compensate in whole or in part the defendant's set-off, apply the doctrine of compensation or set-off to the accounts? Cases may exist when it would be highly equitable to do so, and very inequitable to permit the defendant to apply his demand or account to the claim set forth in the bill, when the complainant had other accounts, which, when applied, would satisfy the defendant's set-off. In such cases a court of equity would, I think, have applied the account of the complainant in payment or compensation of the defendant's account. (See *Story's Eq.* § 1481, *et seq.*; *Parsons agt. Nash*, 8 *How. Pr. R.* 454.)

It is declared by the Code that a defendant may set forth by answer as many defences and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both, § 150. I suppose that we are to take jurisdiction of equitable set-offs as well as legal, or such as the revised statute specifies, and that we are to take notice of equitable as well as legal defences to set-offs pleaded by a defendant. The motion must be denied, with costs.

Cowles and Curtis agt. Cowles.

SUPREME COURT.

COWLES AND CURTIS, Respondents, agt. COWLES, Appellant.

An order of an inferior court striking out a part of the defendant's answer, reversed on appeal from the final judgment of such inferior court.

The defendant, upon showing that one of several plaintiffs is the sole party in interest, may avail himself of a set-off, in all respects as if the action had been brought in the name of such plaintiff alone.

General Term, Erie Co., June, 1854. MARVIN, BOWEN, and GREEN, Justices. This action was brought by the plaintiffs against the defendant, in March, 1852, in the late recorder's court of the City of Buffalo, upon a promissory note, bearing date October 11, 1850, payable to the plaintiffs on demand. The defendant answered that, soon after the date of the note, and before the first day of August, in the year 1851, the note became the sole property of the said Curtis, and then alleged a set-off against Curtis, accruing to the defendant, after Curtis became the owner of the note, and prior to the commencement of the action, of an amount larger than the sum owing on the note, and claimed judgment against Curtis for the balance. This allegation of set-off was, on motion of the plaintiffs, stricken out from the answer by an order of the recorder's court, with costs of the motion. The action was afterward brought to trial, and the defendant offered to prove the set-off, as the same was alleged in that part of his answer which had been so stricken out by the court. To this the plaintiffs objected, on the ground that it was inadmissible under the pleadings as they then stood. The court sustained the objection, and the defendant excepted. The plaintiffs had judgment for the amount of the note. The defendant appealed to this court.

I. T. WILLIAMS, *for the Appellant*, cited Robinson agt. Bagly. (1 Burr, 316.)

A. P. NICHOLS, *for the Respondents*.

By the Court—MARVIN, Justice. By section 329, contained in that part of the Code relating to appeals in general, it is

declared that, "upon an appeal from a judgment, the court may review any intermediate order involving the merits, and necessarily affecting the judgment." If the defendant's answer contained a legitimate defence, of which he was deprived by the order of the recorder's court, then the order involved the merits, and necessarily affected the judgment; and the decision of the court, striking out a portion of the answer, may be reviewed upon this appeal.

Two questions are raised: First, in an action upon contract by two or more plaintiffs, can one of them have judgment in his favor, the evidence establishing the cause of action in him alone? Second, if so, can the defendant, upon showing the cause of action to be solely in the one plaintiff, avail himself of a set-off against that plaintiff, in a case where he would have had the right to do so, had the action been commenced by that plaintiff alone?

It can hardly be necessary to remark that, prior to the Code, the plaintiffs in an action on contract must have shown a joint cause of action in all of them, otherwise they would have been nonsuited. In my opinion, the Code has changed this rule. It was a leading and avowed object of the Code to establish a uniform course of proceeding in all cases, and to abolish all distinctions between legal and equitable remedies. We know that the rules touching parties to a suit in equity, and parties in actions at law, were very different. It was a general rule in equity that all persons materially interested in the matter of the bill ought to be made parties, plaintiffs or defendants. In actions at law, the general rule was, that the action should be brought in the name of the party whose *legal* right had been affected. If there was a mistake as to parties in an equity suit, it did not necessarily follow that the bill must be dismissed. It could be amended. It could be dismissed upon the hearing, with costs as to some of the defendants, and a decree could be made against others. The technical rules in an action at law, as to parties, never prevailed in equity. The court hearing the cause, and deciding without a jury, was enabled to mould the judgment of the court by the form of the decree so

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as to do justice to all the parties. But I shall not enter upon a discussion of parties to suits in equity or actions at law, nor insist that the Code has adopted either of those systems exclusively. It has, however, declared that every action must be prosecuted in the name of the *real party in interest*, except in certain cases. (§ 111.) This was the general rule in equity. It has abolished all previous forms of pleading, and has prescribed forms and rules of its own. (§ 140.) Where there is a defect of parties, plaintiff or defendant, apparent upon the face of the complaint, the defendant may demur. (§ 144.) If the defect does not appear upon the face of the complaint, the defendant may take the objection by answer. (§ 147.) If the defendant does not demur or object by answer, this objection of a defect of parties is waived. (§ 148.) Ample provisions are made for amendments. The court may, before or after judgment, amend any pleading or proceeding, *by adding or striking out the name of any party*. (§ 173.) But let us turn at once to § 274, which declares that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. It has always appeared to me that this language was too plain to be mistaken, and that the legislature intended by it to abrogate the rule at law, by which the plaintiffs were turned out of court if they failed to show a joint right of action or a joint liability against defendants in actions upon contract. The commissioners say so in their report of this section. (*See 1 Report.*) It was supposed at one time that this provision was only applicable to equity cases. I find nothing in the Code countenancing this view; and we should keep in mind that a leading object of the system was the abolition of the distinction between legal and equitable remedies, and the establishment of a uniform course of proceeding in all cases. (*See preamble to Code.*) An addition to § 274 was made in 1851, providing for a severance of trial in a class of cases, whenever a several judgment might be proper. This qualification has been erroneously, as I think, applied to the old section. See examination of this question in *People agt. Cram and White*, (8 *How. P. R.* 151.) In that case the action

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was against the defendants, upon a joint and several bond, and it was held that the plaintiff was entitled to recover against one of the defendants upon establishing the cause of action against him, in case it appeared that his co-defendant was not a joint contractor or jointly liable.

In the case now under consideration, the defendant proposed to show that the cause of action was not joint in the plaintiffs; but that one of the plaintiffs was the real and sole party in interest, and then to establish a set-off as against him. The rule laid down in the People agt. Cram and White, if applicable to plaintiffs, is an authority in support of the answer in this case; and I am not able to see any good reason why the same rule is not applicable where there are too many plaintiffs, as where there are too many defendants. The same language is used in the act in reference to plaintiffs as is used in reference to defendants. "Judgment may be given for or against one or more of several plaintiffs," &c. The same argument from § 136 cannot, it is true, be deduced in favor of the construction of § 274, in the case of too many plaintiffs as in the case of too many defendants. Section 136 treats of defendants only, and there was no occasion there for speaking of plaintiffs. The section relates to joint and several debtors.

The recorder's court permitted that part of the answer alleging that one of the plaintiffs was the sole owner of the note, to stand, and I suppose with a view of allowing the defendant to establish, if he could, that one of the plaintiffs had no interest in the suit, and then nonsuit the plaintiffs. In my opinion, no portion of the answer should have been stricken out, and the defendant should have been permitted upon the trial to establish the facts alleged in his answer, upon giving evidence which would justify a jury in finding that Curtis, one of the plaintiffs, was solely interested in the cause of action. The defendant should have been permitted to prove his set-off against Curtis, and the question should be submitted to the jury with proper instructions, that if they find as a fact that Curtis alone had an interest in the note, then they should pass upon the set-off, and ascertain the balance. It might be proper

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in such a case to submit it to the jury with questions to be answered in writing. (*Code*, § 261.) I think the learned recorder erred in striking out that part of the answer touching the set-off against Curtis, and the judgment should be reversed, and the order vacated.

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Since the passage of the act relating to wagers, &c., (1 R. S. 662, §§ 8, 9, 10,) it is necessary that the plaintiff, in declaring upon a policy of insurance which on its face does not import any interest in him in the subject of the insurance, should aver that the assured had an interest to be protected thereby, in such a sense that the insurance operated as a security or indemnity to protect him from loss by the perils insured against.

WRIGHT AND MERRIHEW, *Attorneys*.

WRIGHT, *of Counsel for Plaintiff*.

D. D. LORD, *Attorney*.

D. LORD, *of Counsel for Defendants*.

Special Term, June, 1854.—Demurrer to complaint.

WOODRUFF, J.—This is an action to recover for insurance effected by the plaintiff with the defendants, “for account of whom it may concern—loss, if any, payable to him,” to the amount of five thousand dollars, upon freight valued at the sum insured, carried or not carried, for twelve calendar months, on board the propeller General Warren; and the policy provides that the *policy* shall be *proof of interest*, and “in case of loss, such loss to be paid in thirty days after the proof of loss and proof of interest, and adjustment exhibited to the insurers.”

The complaint sets out these facts, stating the policy in *hæc verba*, and then contains averments of a total loss. That the plaintiff has performed all conditions and agreements on his part to be performed, &c., and that “he furnished the defend-

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ants with due proofs of the loss aforesaid and of interest ;” that, by means of the premises, the defendants became indebted to the plaintiff in the sum of \$5,000—non-payment—wherefore, &c.

The defendants demur to the complaint on the ground that the plaintiff has not stated facts sufficient to constitute a cause of action ; and, especially, that it is not averred that the plaintiff had any interest in the vessel or her freight ; and no interest being averred, the policy is not an insurance for the security or indemnity of the party insured, but is a wager, bet, or stake made to depend upon a chance, casualty, or uncertain event, and is therefore illegal and void.

Another specification was made in the demurrer, for that it is not averred that the vessel had any cargo on board or engaged, or any freight engaged ; but the demurrer was not urged by counsel on the argument upon the ground contained in this specification.

It was not claimed by the counsel for the plaintiff that an action on a policy of insurance is within that provision of our Code of Procedure which authorizes a plaintiff, in an action founded on an instrument for the payment of money only, to declare, by simply giving a copy of the instrument, and stating that there is due to him thereon from the defendant a specified sum, which he claims.

The plaintiff’s counsel, in support of the complaint, insists that no averment of interest in the plaintiff is necessary ; and, second, that the averment in the complaint, that the plaintiff “furnished the defendants with due proofs of loss and of interest,” is a sufficient averment of *interest in the plaintiff*, if such averment be necessary.

First. Is it necessary, in declaring upon a policy of insurance, (since our statute relating to wagers, &c.,) that the plaintiff should aver an interest in the subject of the insurance ?

By our statute entitled “Of Betting and Gaming,” (1 *Rev. Stat.*, 662,) it is enacted in § 8 that “all wagers, bets, or stakes made to depend upon any . . . lot, chance, or casualty, or unknown or contingent event whatever, shall be unlawful ;” and all such contracts are declared void. And in § 10, that “the two last sections shall not be extended so as to prohibit

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or in any way affect any insurances made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law."

It is not denied that a contract of insurance made for the benefit of one who hath no interest in the subject of the insurance is a wager. It has been so regarded by the courts since about the beginning of the last century, when, it is said, policies of insurance, "*interest or no interest*," were introduced in England.

Indeed, it being the object of insurance, in its original and proper use, to indemnify the assured against a real loss, it was a perversion of the contract to apply it to cases in which there was no real loss against which indemnity was sought; and had the courts continued to regard the undertaking of the insurer as a *contract to indemnify* merely, no recovery could ever have been had by an insured party who had no interest in the subject. Viewing the contract in this light, the court of common pleas in England, as late as 1720, (*Depaba agt. Ludlow, Com. R. 360*,) construed the terms "*interest or no interest*" to import merely that "*the plaintiff has no occasion to prove his interest, and that the defendant cannot controvert that.*"

Regarding, then, a policy as a contract of indemnity, there could be no recovery by an assured having no interest, because he could not be damnified. But it being held that a wager was a valid contract, such policies were sustained *as wagers, and only as wagers*, in which aspect, although upheld by courts of law, the courts of equity refused to sustain or enforce them.

Our legislature regarded such contracts as wagers. This may be assumed, not only because for more than one hundred years in England and in this country they had been so regarded, but because the legislature, when passing the act declaring all wagers void, deemed it necessary to provide that an insurance made in good faith for the security or indemnity of the party insured, should not be thereby prohibited.

It may be added without much refinement upon the definition in the statute, that every insurance is in its nature a bet or wager; if not so according to the ordinary acceptance of those terms, it is so within the strict import of the language of the

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prohibitory section of the statute. It is an agreement by which the insurer wagers a large sum, the payment whereof is "made to depend upon the happening of some chance, casualty, or unknown or contingent event."

I cannot resist the conclusion that the contract, as set out in the complaint in this action, when construed with reference to the provisions of our statute, is *prima facie* an insurance within the prohibitory clause in the statute, and not shown on its face, nor by any averment to be saved by the exceptions in the tenth section.

No property or interest in the subject of the insurance (the freight) is stated, no fact is alleged from which the law infers any interest in the freight. The insurance is expressed to be on account of whom it may concern, and there is no intimation that the plaintiff, or any person for whose benefit the contract was made, was in any manner concerned in the matter. No interest in the ship either as charterer or otherwise which would in anywise involve an interest in the freight is intimated. There is nothing to show that the plaintiff would be damnified by the loss, or that there was any thing in his relation to the subject which made an indemnity or security to him possible, and, finally, the freight is valued at the sum insured, "carried or not carried," a provision, though somewhat speculative, perfectly proper if he had an interest in the freight, which might be earned upon cargoes to be procured within the twelve months, if the vessel was not lost, but which, if he had no such interest, made the wagering character of the policy most obvious.

It seems to me that the contract thus exhibited is an insurance without interest. It is suggested that the words in the policy, "Policy proof of interest," prevents such an inference. Not so; those words do not purport to state or suggest any fact regarding the relation of the assured to the subject, but only to regulate the manner in which such fact may be proved, if necessary; the use of such words, so far from showing that the assured had an interest, savor strongly of a wager, and may rather be deemed to indicate (though not conclusively) that a

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wager was intended, and for that reason policies containing those words have been prohibited by statute in England ever since 1732, as pernicious in their tendency; and surely if it be necessary for a plaintiff to prove his interest to make his contract valid, the statute cannot be made a dead letter by such a convention between the parties which operates to dispense with it. To hold such a stipulation conclusive would enable the parties to evade the statute whenever they agreed to do so, and the statute would be no protection against the evils it was designed to prevent; and if the effect of those words is that the plaintiff need not prove interest, and the defendant cannot controvert it, I should incline to hold that the use of those words in a policy was itself a fraud upon the statute, and rendered the policy void on its face.

If, then, the contract set forth in the complaint is *prima facie* an insurance without interest, it is by the plaintiff's own showing a wager, and *prima facie* within the prohibition in the statute.

But it is not necessary to hold that the contract set forth is to be taken *affirmatively* as *prima facie* an insurance without interest, and it is supposed that the observations of KENT, *Ch. J.*, in Clendenning agt. Church, (3 *Caines R.* 141,) and SAVAGE, *Ch. J.*, in Buchanan agt. Ocean Ins. Co., (6 *Cow.* 332,) forbid such a holding. The construction and effect of those cases will be presently noticed. But conceding for the present that such is the authority of those cases, it still remains true that the contract set forth in the complaint does not by any of its terms *import interest* in the plaintiff in the subject of the insurance, nor is his case supported by any averment which brings him within the exception in the statute. In other words, he has not stated facts upon which it can be said affirmatively that he is entitled under the statute to recover the sum insured.

It was insisted that the contract itself implied an interest in the plaintiff, and that it was therefore only necessary for the plaintiff to set out the contract, with its consideration, and aver the breach, and so put the defendants to defend. This view of the subject puts an *interest* in the *contract* (which, as a contracting party, the plaintiff undoubtedly has) in the place

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of an *interest* in the *subject* to which the contract relates, without which interest the contract is itself void.

The case mainly relied upon by the plaintiff to show that no averment of interest is necessary in declaring upon a policy is Nantes agt. Thompson, 2 *East*. 385. In that case GROSE, Justice, in giving the opinion of the court, undoubtedly expresses the opinion that in declaring upon an interest policy, the authorities are in favor of dispensing with an averment of interest; and yet a careful examination of the case and the opinion will, I think, show that the views of the court there rather indicate that under *our statute* such an averment is necessary than the contrary. In the first place, that case did not turn at all upon the question whether the contract as declared upon was to be deemed void as a wagering policy. That was not claimed, for it being an insurance on a foreign ship, the contract was valid whether a wager or not, it not being within the statute 19 Geo. II., chap. 37, prohibiting wagering policies. But the question urged upon the court was, whether a contract of insurance was not to be taken to be according to its original and proper meaning, a contract of indemnity, and whether, therefore, if no interest was averred, the plaintiff did not fail to show any ground of indemnity; and, on the other hand, if the policy was to be taken as a wager, whether it must not appear by the complaint that the defendant entered into the wager as such, and with a full understanding of the nature of his engagement.

All that it was necessary to decide, and all that the court did in fact decide, was, that where the insurance, whether made upon interest or without interest, would be alike *valid*, it was not necessary that the declaration should aver any interest. It by no means necessarily follows from that decision that, in a case which comes within the prohibitory statute, (under which, if the assured have no interest, the policy is void,) an averment of interest is unnecessary; and as evidence that in that case such averment was a matter of *prudence*, at least, the court say that, "subsequent to the statute 19 Geo. 2, we do not find any instance where, in cases within that statute, an interest has not

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been averred; which affords some inference that, without such averment, a policy in the form this is, (*i. e.*, which does not on its face show that the assured has an interest in the subject,) is not necessarily to be taken to be an interest policy." This suggestion of the court tends manifestly to support the views above expressed.

The two cases in this state cited in support of the present declaration, (3 *Caines*, 141, and 6 *Cow.* 316, above referred to,) both rest upon this same case from 2 *East*, and proceed upon a similar view. At that time a wager policy was a lawful contract in this state, and therefore, whether an interest was averred or not, did not affect its validity, however the question of interest or no interest might affect the right of recovery for any but a loss absolutely total; and the court (in 3 *Caines*) in considering the effect of an omission to aver an interest, assume that the contract was valid, interest or no interest, and *for that reason*, as I think, say that such omission is not to be considered as *decisive evidence* of no interest. The right of recovery in that case depended, if the assured had no interest, upon the question whether the loss was total; and the court, finding upon the whole of the plaintiff's evidence that he had no interest, and that the loss was not total, sustained the nonsuit ordered at the trial.

It by no means follows that, if an interest in the assured had at that time been essential to the validity of the contract itself, such an averment would not have been deemed necessary. The case from 6 *Cowen* involved the same question, and was decided upon like grounds.

Again, the court in the case of *Nantes agt. Thompson* (2 *East. supra*) refer to the original design and nature of the contract of insurance, as stated in the early history of the subject, *viz.*: as a contract of indemnity from a real loss, (*vide Park on Ins.*, 1, 2, 259, 260,) and to its subsequent perversion, so as to be used for other purposes, and the employment of the terms "insurance" and "assured" in a loose and improper sense when the party had no interest—and they very distinctly intimate (though they were not called upon by that case so to decide in

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terms) that if they were now called upon to put a construction upon the instrument, considered in its most proper signification as a contract of *indemnity*, they should deem an averment of interest necessary—and upon the ground that a plaintiff, relying upon a contract of indemnity, and demanding that indemnity, must show that he had been damnified.

This, I apprehend, is what this court, under the present statute of New-York, is called upon to do. We are called upon to put a construction upon the contract as alleged in these pleadings, considering it as a contract of indemnity or void.

Our statute in this respect has restored the contract of insurance to its original and proper signification, viz.: a contract “for the security or indemnity of the party insured;” and if the present be not such a contract, it is void. (*Vide 1 Rev. Stat. 662, § 10 and § 8, above cited.*) By its plain provisions there can be no valid insurance unless some interest is at hazard of loss against which an indemnity or security may be provided; in other words, there can be no valid insurance unless the assured has an interest; and, therefore, unless such an interest appears, no valid contract is shown, and no liability is created; and no obligation is charged upon the defendants without some averment that brings the plaintiff within the provisions of the statute. It may perhaps be said, as before suggested, that every insurance (within the terms of the eighth section of the act in the comprehensive language employed by the legislature in some sort as a definition of what they intended by wager, bet, or stake) may be regarded as a stake, bet, or wager upon a chance, casualty, or contingent event; and that such is *the form* of the contract, when considered irrespective of its application to the particulars of each case, and therefore, that one who seeks to recover upon a policy, must always show that his case is within the exceptions made by the tenth section of the act before his title to any recovery can appear. In other words, that he must show that under the circumstances to which the contract in question is applicable, the contract was for indemnity or security.

It seems to me just to say that the statute, when it declares

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that the prohibition shall not extend to insurances made in good faith for the security or indemnity of the party insured, by clear implication declares that it shall embrace and make void every other insurance. If this be so, then it is as if the legislature had said all insurances shall be void except those so made.

It would not, I think, be doubted if that had been the language of the statute, that a plaintiff claiming under an insurance must have averred facts showing that his case is within the exception.

It was suggested that the plaintiff need not show himself to be within the exception, but that the defendants, if such be their defence, must set up in their answer the want of interest in the plaintiff, and show on their part that the contract is void; and it was added that a plaintiff, in declaring upon an agreement to pay money, need not anticipate and negative the defence of usury. He may leave that to be set up by the defendant.

This example furnishes a very proper illustration of the effect of statutes like the present, but it operates against the plaintiff. The question, which of the parties has the burden of showing (and of course of alleging) the facts which make a statute applicable to the contract in question often arises, and the answer depends upon the frame of the statute itself. Where a statute declares that a deed or contract is void, if or provided it is made in a particular manner or upon a specified consideration, (*e. g.*, upon usury,) it is not necessary for the plaintiff to negative the condition; he may leave it to the defendant to set up the facts which bring it within the condition upon which, and upon which alone, it is void.

But where a statute makes a deed, or agreement, or other act void, unless made upon a specified consideration, or under specified circumstances, the rule is reversed; the plaintiff must show that the circumstances exist under which alone it can have validity; the defendant in such case may rest upon the general prohibition.

This rule of pleading I believe to be familiar, and it seems to me to be applicable to this case.

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But, *secondly*, The plaintiff insists that by averring that the plaintiff "furnished the defendants with due proofs of the loss and of interest," he has sufficiently averred his interest in the subject.

I think not. An averment that he has *furnished proof* of interest is no allegation that he has an interest. A denial of that averment would not put the question of interest in issue; it would simply amount to a denial that the plaintiff had furnished the preliminary proof in compliance with the conditions of the policy. Nothing can be said to be a sufficient averment of a fact which, if denied, would not put the fact in issue. Suppose the only averment of *loss* was this same statement that the plaintiff had furnished to the defendants proof of loss; it could never be claimed that this sufficiently alleged the loss itself. Indeed, nothing is more common than for a defendant on the trial to admit the sufficiency of the preliminary proofs, and that they were furnished to the defendant; and yet that never dispenses with proof of loss on such trial.

My conclusion is that, under our statute, it is necessary, in declaring upon a policy of insurance, (especially where the policy does not on its face import that the insurance is upon interest,) to aver that the insured had an interest to be protected thereby, in such a sense that the insurance operated as a security or indemnity to protect him against loss from the perils insured against.

Having such interest, and it so appearing, that interest may be valued in the policy, perhaps the policy may be made by the agreement of the parties *prima facie* evidence of such interest; but these provisions of the policy relate to the evidence to be received to those points on the trial, and in no wise dispense with such averments as show the *contract itself* to be valid and binding upon the parties.

Judgment must be ordered for the defendants on the demurrer, but the plaintiff may have the usual leave to amend his complaint within twenty days, on payment of costs.

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SUPREME COURT.

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The provisions of the revised statutes allowing *double* and *treble costs* are repealed by the Code. (*The views taken in the several reported cases in this work which decide in the same way, concurred in.*)

And this repeal includes the provisions for treble costs allowed in actions when brought against *Indians* in violation of the law of 1813.

In all *civil actions* the prevailing party can only recover the "certain sums by way of indemnity" that are specified in the Code, and such additional allowance as the court may, under its provisions, allow.

Erie General Term, May, 1854. MARVIN, BOWEN, and GREEN, J. J. Appeal from Order of Special Term, affirming the adjustment of costs by the clerk. The defendant is an Indian, and claimed treble costs, which the clerk allowed.

J. C. STRONG, *for Plaintiff.*

DYER TILLINGHAST, *for Defendant.*

By the Court, MARVIN, Justice. By the act of 1813, relative to the different tribes and nations of Indians in this state, actions against any of the Indians, upon contract, are forbidden. "And every person who shall sue or prosecute any such action against any of the said Indians shall be liable to pay treble costs to the party grieved."

By the revised statutes, in actions against public officers, &c., if judgment was rendered for the defendant, the defendant was entitled to recover "his taxed costs, and one-half thereof in addition." The revised statutes do not include the case of an action against an Indian, and have not affected the provision in the statute touching actions against Indians, unless the provision of the revised statutes should be regarded as a legislative construction of the meaning of double and treble costs, that is, that double costs mean half, and treble, three fourths costs. It is declared in section 303 of the Code, that "all statutes *establishing* or regulating the costs or fees of attorneys, solicitors, and counsel in civil actions, &c., are repealed," &c. But there may be allowed to the prevailing party,

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upon the judgment, certain sums, by way of indemnity, for his expenses in the action; which allowances are termed costs. It is claimed by the plaintiff's counsel that the Code has repealed the provision in the act of 1813, touching costs in actions against Indians. The defendant's counsel claims that the provision has not been affected by the Code. There have been numerous decisions under the Code upon the question, whether the provisions in the revised statutes, giving double costs to officers, &c., are repealed by the Code, and these decisions are conflicting. It is important that this question, and all questions of practice, should be settled, and that the decisions should be uniform, that the profession may know how to act; but it seems impossible under the Code, and the present organization of the court, to attain these desirable ends.

I have examined the decisions upon the question, and the weight of authority seems to be upon the side of those claiming that the Code has repealed that portion of the revised statutes giving double costs to officers, &c. I think, were there but a single decision upon the question, I should be disposed to follow it. But this is not so. I, however, am inclined to the opinion that, by the Code, all statutes giving costs in civil actions are abrogated; and I am inclined to concur in what seems to be the weight of authority upon this question, and thus aid, if possible, in settling the law. If the provisions in the revised statutes, giving double costs, are repealed, then I think the provision in the act of 1813, making the party suing an Indian liable for treble costs, is also repealed, and in such "civil action" no more costs than are allowed by the Code can be given. I do not propose to enter into a discussion of the question, nor to cite the cases. The question has been ably considered by many of the judges, whose opinions have been published. It may be proper to make a few suggestions. Costs are given by statute only. The act of 1813 does not specify any items of cost. It simply makes the party suing "liable for treble costs." Suppose, after the passage of the act, all statutes regulating the amount of fees or costs, had been repealed, could any costs be recovered? In order to know

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what treble costs are, it is necessary that we know what single costs are, and to ascertain this it has always been necessary to resort to the statutes specifying the amount and items of costs. The same remarks apply to *double costs* in actions against officers. The legislature has, from time to time, changed the fee bill, or items of cost, thus affecting, not the provisions touching double and treble costs, but the amount that should be recovered. Suppose the Code had stopped by declaring that all statutes *establishing* or regulating the costs or fees of *attorneys, solicitors, and counsel*, in civil actions, are repealed, could it be claimed that officers sued, or an Indian, could recover any costs? or that any party succeeding could get costs? Should we not be restored to the common law? The Code, however, does not stop at the supposed point; but it declares that "there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity, for his expenses in the action; which allowances are in this act termed costs." The "certain sums" are specified in future sections, in which nothing is said about double or treble costs. Now, where is the authority for any other further or different costs in a civil action than those specified in the Code? All prior statutes fixed the items of costs as fees of the attorney, counsel, solicitor, &c. It is not material to inquire who were entitled to the costs, the party or his attorney, &c. I refer to the manner of framing the acts giving the costs and specifying the items, in reference to the language used in the Code, "costs, or fees of attorneys, solicitors, and counsel." All such statutes are repealed, and all prior statutes which regulated the costs or fees, by referring to the attorney, counsel, or solicitor, &c. My conclusion is, that in *civil actions* the prevailing party can only recover the "certain sums by way of indemnity" that are specified in the Code, and such additional allowance as the court may, under its provisions, allow, that the provisions touching double and treble costs are abrogated.

The order of the special term must be reversed, and the clerk must adjust the costs as provided by the Code, without increasing the single costs.

Robinson agt. Judd.

SUPREME COURT.

ROBINSON agt. JUDD.

A *demurrer* to a complaint will not lie, on the ground that several causes of action are improperly united, where the several causes of action stated belong only to *one class*, mentioned in § 167 of the Code, *although they may not be separately stated*. (See *Van Namee agt. Peoble, ante, p. 198, and Strauss agt. Parker, ante, p. 342, adverse.*)

The words "improperly united" have reference to the character or classes of actions, as specified in § 167, and not to the manner of stating or setting forth the causes of action in the complaint.

The Code does not authorize a *demurrer* for *duplicity*. (*The case of Goding agt. M. Allister, ante, p. 123, fully concurred in. See Strauss agt. Parker, ante, p. 342, adverse.*)

If a pleading is not authorized by the Code, or if the manner of pleading is not authorized, and the Code has provided no specific mode of bringing the question before the court, it may be presented by motion, generally, if not always, upon the ground of irregularity.

The amendment in 1852 to § 172 of the Code, authorizing the court in its discretion to order actions to be *divided*, applies to actions in the *different classes*, specified in § 167.

Niagara Special Term, June, 1854. Demurrer to complaint, on the ground that "several causes of action have been improperly united."

H. GARDNER, *for Plaintiff.*

WOODS AND MURRAY, *for Defendant.*

MARVIN, Justice. The plaintiff alleges in his complaint that, in February, 1850, at the special instance and request of the defendant, he lent and advanced to him \$250; that at the same time, and at like request, he sold and delivered three silver watches, of the value of \$68, to the defendant; that from February, 1850, to August, 1853, he, at the request of defendant, furnished, delivered, and sold to the family of the defendant a large amount of goods, merchandize, property, &c., &c., of the price and value of \$950; that during the same time, and at like request, the plaintiff, his agents, and servants performed work, labor, and service for defendant and family to the amount of \$50; that during same time, at like request, he lent and

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advanced to, and paid, laid out, and expended for defendant and family \$500; that during same time, and at like request, he paid house rent for, and furnished house room to, defendant and his family to the amount and value of \$90; that during same time, and at like request, he paid to one Thayer a debt owing by defendant to Thayer of \$9.75; that in April, 1851, at like request, he caused and procured a policy of insurance upon the life of the defendant, to be issued to and for the benefit of defendant's wife, and paid the premium, \$45.05; that defendant, though often requested, has not paid, &c., &c., and is indebted to plaintiff \$1,500, for which sum the plaintiff demands judgment.

The defendant's counsel alleged on the argument that the complaint contained eight distinct causes of action, and insisted that they were not separately stated, and that for these causes a demurrer was proper.

Assuming, for the present, that the counsel's construction of the complaint is correct, does the Code authorize a demurrer?

The complaint is to contain a plain and concise statement of facts constituting a cause of action. (*Code*, § 142.) The defendant may demur to the complaint, when it appears upon its face, 5. "that several causes of action have been improperly united." (§ 144.) The plaintiff may unite in the same complaint several causes of action, when they shall all arise out of 2. contract expressed or implied. This section contains seven classes of actions, and all that belong to one of the classes may be united in the same complaint. It is, however, declared in the section that the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and *must be separately stated*. (§ 167.)

Let us consider these provisions. The plaintiff may unite in his complaint several causes of action when they arise out of contract, and one of the requirements is, that they must be separately stated. All the grounds of demurrer are specified in the Code. There are six of them. The demurrer is to specify the grounds of objection. The defendant may demur when

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it appears upon the face of the complaint that several causes of action have been improperly united. Is it meant by this that the defendant may demur when causes of action belonging to the same class, and which by § 167 may be united, are united in a single statement of cause or causes of action? Or does it mean that the defendant may demur when the plaintiff has united in his complaint causes of action belonging to the different classes enumerated in § 167? In other words, may the defendant demur on account of the *manner of uniting* the causes of action, though they be such as "he may unite in the same complaint?" It seems to me that it was only intended to authorize the demurrer when the plaintiff united in his complaint causes of action which, by § 167, he was not authorized to unite; as, for instance, an action arising out of contract, and an action for injury to character. In my opinion the Code does not authorize a demurrer for duplicity. It is not satisfactory to say that the Code only authorizes a plaintiff to "unite in the same complaint several causes of action" upon certain conditions, or with certain directions or qualifications; but it is necessary to show that, in case these conditions are not complied with, or the directions not followed, that the Code authorizes a demurrer. The uniting of certain specified causes of action in the same complaint is authorized, and the uniting of any causes of action in the same complaint not so specified, is not authorized; and if causes of action not so specified and authorized are united, then "several causes of action have been improperly united," because the Code does not authorize such uniting in the same complaint, and the defendant may demur. "Improperly united" has reference to the character or classes of actions as specified in § 167, and not to the manner of stating or setting forth the causes of action in the complaint.

We are endeavoring to ascertain the meaning of the fifth subdivision of § 144, and whether it is applicable to the present case. This section has undergone no amendment. It is now as it was prepared by the commissioners on the Code. By turning to § 143 (now § 167) of the Code of 1848, classifying the actions that may be united, it will be seen that it contains no

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requirement that the causes of action should "be separately stated." These words were added by the amendment of 1849. Do they change the meaning of the section touching demurrers, or call for a different construction or application of the words "improperly united?" If the question we are now considering had arisen under the Code of 1848, I think no one would have contended that the Code authorized a demurrer. It is often very important, when we are endeavoring to ascertain the meaning of provisions in the Code, to go back and follow up the Code from its origin, and note carefully the amendments, and consider their effect upon sections not amended. It seems to me clear that the commissioners had no reference to *duplicity*, when they specified as one of the causes of demurrer that several causes of action have been improperly united.

The provisions in § 150, requiring a defendant to state separately in his answer each of his defences, and that they should refer to the causes of action they are intended to answer; and § 151, authorizing a demurrer to one or more of several causes of action stated in the complaint; have been referred to in support of the position that duplicity is a good cause of demurrer. (4 *How. Pr. R.* 228.) Undoubtedly a separate statement of each cause of action should be made. The Code only authorizes a statement of facts constituting a *cause* of action—one cause of action; and the provisions in §§ 150 and 151, and other sections, assume that the pleader will prepare his pleadings as authorized by the Code, and in accordance with its provisions; but they do not prove that, in case the complaint is not prepared according to the Code in all respects, that the defendant may demur. On the contrary, all the causes of demurrer are *specified*; and if the complaint in other respects is not framed according to the authority or requirements of the Code, a demurrer can not be interposed. If a demurrer is to be permitted for duplicity in a complaint, it should be allowed for duplicity in an answer, in order to make the system consistent. The defendant is required to state each defence separately. Suppose he does not comply with this requirement, it will not be contended that the plaintiff can demur. He can only demur for *insufficiency*.

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As an original question, my opinion was as here stated. In 1849, Justice WILLARD, in *Durkee agt. Saratoga & Washington R. R. Co.*, (4 *How. Pr. R.* 226,) held that a demurrer was authorized by the Code when the complaint, in the same statement, set forth several causes of action, though they all belonged to a class of actions which might be united in the same complaint. His opinion seems to have been influenced mainly by the provisions in § 167, that the causes of action "must be separately stated." From a strong desire that the questions arising under the Code should be settled, that the profession and the court might "know the law," I was disposed to acquiesce in the decision of the learned judge, though adverse to what I supposed the proper construction of the Code. It is extremely important that our practice and system of pleading should be settled, and as uniform as possible through the state. It is often quite as important that a question of practice or pleading be settled, as it is how it is settled.

In *Getty agt. Hudson River R. R. Co.*, (8 *How. Pr. R.* 179,) Justice HARRIS adopts the views of Justice WILLARD, and refers also to *Pike agt. Van Wormer*, (5 *How. Pr. R.* 171,) in which Justice WILLARD reiterated his opinion in *Durkee agt. Saratoga & Washington R. R. Co.*, *supra*, though the demurrer had not raised the question.

More recently Justice WELLES, in *Gooding agt. M'Allister*, (9 *How. Pr. R.* 123,) has examined the question, and reviewed the opinion in *Durkee's* case, and he came to the conclusion that a demurrer can not be interposed for duplicity. The question is ably discussed by Justice WELLES, and I concur most fully in his construction of the Code touching the question now under consideration. In *Benedict agt. Seymour*, (6 *How. Pr. R.* 298,) Justice SELDEN, after noticing that the Code only authorizes a statement of "a cause of action, that is, a single cause of action," points out the remedy, if the complaint contains more than one cause of action in the same statement, viz.: a motion to strike out all the allegations not essential to a single cause of action. I fully concur in this view.

If a pleading is not authorized by the Code, or if the man-

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ner of pleading is not authorized, and the Code has provided no specific mode of bringing the question before the court, it may be presented by motion, generally, if not always, upon the ground of irregularity. We have been in the constant practice, since the amendments of 1852, of setting aside or striking out replies to answers which do not contain new matter constituting a counter claim, on the ground that a reply in such a case is not authorized. There may be many defects in a complaint that can not be reached by a demurrer.

Before taking leave of this question, it may be proper to refer to a provision inserted in 1852 in § 172. It is: "If the demurrer be allowed for the cause mentioned in the fifth subdivision of § 144, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned."

I have been in doubt as to the meaning of this provision, and as to what application is to be made of it. It occurred to me, at one time, that possibly it was intended to provide for a case where a demurrer had been put in for duplicity; and if so, it might be regarded as a legislative construction of the Code, in accordance with the opinion of Justice WILLARD, above cited. I certainly could see no necessity for such provision, (assuming Justice WILLARD's construction to be correct,) as the court had the power to allow an amendment of the complaint, and to permit the plaintiff to separate his causes of action, and make as many statements as should be necessary. On the other hand, it seemed to me that the legislature could not have intended, where the plaintiff had united in his complaint, though separately stated, a cause of action, say, on contract, and a cause of action for injury to character, to authorize these actions to be divided into two actions, and permit the plaintiff to proceed in them as two actions. I have, however, come to the conclusion that this provision was intended to apply to actions in the different classes specified in § 167—that is, if the plaintiff united in his complaint a cause of action in one class with a cause of action in another class, the court

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may, in *its discretion*, order the action to be divided into as many actions as may be necessary, &c. By turning to Alger agt. Scoville and others, (6 *How. Pr. R.* 131,) and noticing the questions there raised, and particularly the ground of the decision, we shall find, I think, the origin and cause of the amendment above stated. This decision was made prior to the amendment. Causes of action were stated upon contract, and also causes of action against a trustee. Actions upon contract, by § 167, belong to the first class: claims against a trustee, by virtue of a contract, or by operation of law, belong to the seventh class. The court held that the demurrer was well taken, and gave judgment for the defendants. Now, by the amendment to § 172, the court, in a case like Alger agt. Scoville, may order the action to be divided. Cases may occasionally occur where it may be proper to divide the action. There may be two or more causes of action, and it may be a question of some doubt to which class they belong, and whether they belong to the same class. The power, after a demurrer has been allowed, to order the action to be divided, is controlled by the *discretion* of the court.

It was my intention to examine the complaint in this case, and show that it is not obnoxious to the full extent to the objections made to it by the defendant's counsel, but I shall waive any discussion of it. The demurrer is overruled.

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COURT OF APPEALS.

BEALES agt. FINCH AND OTHERS.

In an action for a tort against two or more defendants, each defendant, under the amendment made to the Code in 1851, is a competent witness for his co-defendant.

In *all* actions a defendant is a competent witness for his co-defendant. His admissibility as a witness can not be questioned—but he is restricted as to the subject matter of his examination, which is, to questions tending to establish a defence of which his co-defendant can separately avail himself, and in which the witness is not *jointly interested*

Where a witness is called to the stand who is competent to be sworn and testify to some matters, but who may not speak of other matters, it is not proper to object to his competency generally and exclude him.

Upon the question of *mitigation of damages*, where the cause of action is clearly made out against all the defendants, one defendant can not be a competent witness for his co-defendants; for damages are indivisible, and the witness is therefore jointly interested with his co-defendants. If, however, in an action of tort, the case made out against the defendant who is called as a witness is a doubtful one, there is no objection to receive his testimony to mitigate damages for his co-defendants, under proper instructions to the jury, to consider it if they acquit the witness, and to reject it if they find him guilty.

July Term, 1854. This was an action for an assault and battery brought against three defendants. The issues were tried at the Delaware circuit in August, 1851. On the trial, each defendant was severally offered as a witness for the other defendants, but was decided to be incompetent, and excluded. An exception was taken to such decision, and a verdict was given for the plaintiff, on which judgment was entered. On appeal to the general term, the supreme court, sitting in the 6th district, affirmed the judgment; and from that decision an appeal was taken to this court. The cause was submitted on written arguments at the last January term.

A. & R. PARKER, *for Appellants.*

SAYRE & BANKS, *for Respondent.*

By the Court, PARKER, J.—This was an action for an assault and battery. On the trial at the circuit in August, 1851, the defendants were severally offered as witnesses for the other

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defendants, but were excluded by the judge, to which decision the defendants severally excepted.

Under the late practice it was a great and acknowledged evil, that the plaintiff had it in his power, in an action for a tort, by uniting several persons in one action as defendants, to deprive each defendant of testimony to which he would have been entitled if sued separately. By such means, a plaintiff was often enabled to make out his case, and put money in his pocket, when he had, in fact, no good cause of action against the persons sued. Suppose two persons concerned in committing a battery, and a third person standing by as a chance spectator only, and taking no part in the transaction. This spectator being a disinterested witness, his testimony might be necessary to show who struck the first blow, and the two engaged might be indispensable witnesses to prove that the third person was merely a spectator and had nothing to do with the affray. Now, by suing all three together, the defendants were cut off from all such testimony, though each might have had a complete defence. The plaintiff might call as a witness, some one concerned on his side in the affray, and it would take but little testimony to make out a *prima facie* case against the spectator. A supposed look or word of encouragement was enough to make him a principal: for the law was then as it is now, that the slightest evidence against a defendant was enough to require the question, whether the defendant was properly joined, to be submitted to the jury; and as it could not be separately passed upon, it was decided by the jury too late to improve either defendant as a witness for another.

Many cases of great hardship might be supposed; but it is only necessary to state one or two more for the purpose of illustration. Suppose A had sold and delivered his horse to B, and received from him the price, no other person being present except C, who had come with B as a witness to the transaction. If afterwards A sued B & C together in trover for the horse, he could have made out a *prima facie* case, by proving he had owned and used the horse for a long time

before, and that the defendants were seen coming together towards A's stable, and soon after going away together, B leading the horse with C's assistance. Before the Code, the defendants were not permitted, as witnesses for each other, to explain the true state of the transaction, and the plaintiff would have recovered.

Again, suppose six persons, three on a side, engaged in a personal rencontre, no other persons being present. The question to be ascertained on the trial would be, who was the first aggressor? Under the old practice one person on one side could sue all three on the other side, and call his two confederates as witnesses, and they were necessarily the only witnesses in the cause. The plaintiff in such case had the benefit of the testimony of his two associates, and neither defendant could call his co-defendant as a witness. The improbability of ascertaining the truth, under such circumstances, and the palpable injustice of excluding the defendants, are obvious. It was cruel injustice to a party to permit his adversary to disqualify his witnesses at pleasure. The law afforded a very inadequate protection to personal rights when it suffered a plaintiff to place himself in a situation to call all his own witnesses and exclude all the witnesses of the defendants. Upon principle it must be conceded, that every man ought to have the right to be tried upon his own case alone, and to avail himself of all the witnesses who have any knowledge on the subject of the controversy.

It was obviously one object of the Code to correct the evil I have pointed out, by enacting in § 397, Code of 1849, as follows: "A party may be examined on behalf of his co-plaintiff or a co-defendant; but the examination thus taken shall not be used on behalf of the party examined." The only restriction upon this right was that which excluded a party from testifying to matters in which he had a legal interest, and that is still retained. (§§ 398, 399.) This provision was generally regarded as having effected the desired change, and was almost universally acquiesced in by the courts: (8 Barb. S. C. R. 655; 10 id. 290; 5 How. Pr. R. 296;

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4 *Sandf. S. C. R.* 616.) But even under this broad and seemingly plain provision it was held in one case that no change had been effected, and that sec. 397 was only a continuation of the equity practice, (*Monson agt. Hegeman*, 10 *Barb. S. C. R.* 112,) and it became necessary to come into this court to correct the erroneous construction given to the statute, which was done at April term, 1853. That decision of this court, in which it is established that, in an action for tort against two or more defendants, each defendant is a competent witness for the other defendants, is precisely in point and decisive of the case we are considering, unless the law on this point has been changed since the adoption of the Code of 1849.

The provision of the Code I have quoted was as broad as language could make it, and was, I have no doubt, applicable to every action whether for a wrong or on contract. It was even applicable to an action on a contract joint and not several, if there was any separate defence of which one of the defendants might avail himself, such as infancy, discharge in bankruptcy, &c. But as to any defence not separate, that is, for which a separate judgment could not have been rendered in favor of one defendant alone, the statute very properly excluded the testimony of a co-defendant, because, as to such a case, the witness would be interested, and therefore his testimony could not be received. Upon a joint-contract, therefore, where a defendant had no separate defence, and where the contract could not be violated by giving a several judgment, a defendant, if called as a witness, could prove nothing that would not enure to his own benefit as well as to the benefit of his co-defendant, and as to such matter he was therefore interested, and of course incompetent.

But it was decided by a majority of the supreme court in *The Mechanics & Farmers' Bank agt. Rider*, (5 *How. Pr. R.* 401,) that even in an action against two defendants on a contract joint and not several, each defendant might be a witness for the other, to a matter in discharge of the entire contract. This decision was made in May, 1851, and led to amending the Code in July, 1851, so that the provision in question should

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not be applicable to an action on a contract joint and not several, or in which a separate judgment could not be rendered. The 897th section as thus amended was as follows: "A party may be examined on behalf of his co-plaintiff or a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment shall be rendered." The word "shall" in the last line quoted was subsequently changed to "can," which certainly improves the reading of the sentence without materially affecting its meaning.

Though this section is not expressed in very clear terms, it seems to me there can be no doubt as to its meaning. Of course, it can be applicable only where defendants are sued jointly. There can be co-defendants in no other case: and it declares as to what matters a defendant thus sued jointly with others may be a witness for his co-defendants. It is as to a *matter* in which he is not jointly interested, and as to which a separate judgment may be rendered. He is a competent witness in all cases when sued jointly, but only as to certain matters. He may prove that his co-defendant was not present, or, if present, that he took no part in the assault and battery, or any other separate defence of his co-defendant. As to such a matter, surely he, the witness, has no interest, and cannot, therefore, be jointly interested with his co-defendant; and as to such matter, a verdict or judgment which is separate and not joint, can be rendered, and it is therefore within the latter clause of the amendment of 1851. It is very plain, that the 897th section applies to every case of a joint and several contract, and to every tort which is always joint and several, and extends even further, viz.: to contracts joint only and not several, where one of the defendants has a separate legal defence, as may sometimes happen. Such separate defence must, of course, be some matter in which the defendant testifying is not jointly interested, and as to which a separate judgment may be rendered, such as infancy, forgery of the signature of the co-defendant, &c.

This section admits of no other construction than that I have .

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given it, without utterly destroying its sense and rendering it of no effect whatever. To say that it applies only to an action in which a joint judgment cannot be rendered, would confine it to a case where there is only one defendant, for where there are two defendants, there may be a joint judgment: and it cannot mean an action where there is but one defendant, for in such case there can be no co-defendant, and the section would be inapplicable.

This court has already put a construction on this section in deciding the case of Munson agt. Hegeman, above referred to, in which Judge GARDINER said, in regard to sec. 397 in the Code of 1849: "The language is broad enough to embrace every case where there are co-plaintiffs and co-defendants; and it seems to me, that the only restriction imposed by implication is the one substantially embraced in terms in this section as amended in 1851, namely, that such party shall not be examined as to any matter in which he is jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment cannot be rendered."

I entirely concur in this opinion of the learned judge, that the law on this subject is not at all changed by the amendment of 1851, and that such amendment was made only for the purpose of expressing in terms what before existed by necessary implication; and this view is fully sustained by the history of the legislation on this subject, the fact being notorious that the amendment of 1851 was adopted for the purpose of correcting what was deemed an erroneous construction put on the act in the case of the Mechanics' and Farmers' Bank agt. Rider, above cited. My reasons for deeming that construction erroneous are fully set out in the dissenting opinion in that case cited, and need not be here repeated.

In every action for assault and battery, and in all other cases of tort, a verdict and judgment may be rendered in favor of one and against another defendant; that is, in the language of the act, a verdict or judgment separate and not joint may be rendered. In such an action, then, a party may be examined for his co-defendant *as to any matter* as to which a separate and

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not joint verdict or judgment can be rendered—and *as to any matter* in which he is not jointly interested or liable with such co-defendant. In all actions a defendant is a competent witness for his co-defendant. His admissibility as a witness can not be questioned,—but he is restricted as to the subject-matter of his examination. If any question be asked tending to establish a defence of which the co-defendant cannot separately avail himself, the plaintiff is at liberty to object, and the court must exclude it. Where a witness is called to the stand who is competent to be sworn and to testify to some matters, but who may not speak of other matters, it is not proper to object to his competency generally and exclude him. It will not be presumed that an improper question will be asked him. It is only by objecting to improper questions when asked, that a party can exclude improper evidence. A party having a witness upon the stand may be called upon by his adversary to state what he proposes to prove, and in that case he must state it. But he need make no such statement unless called upon to do so. It is enough for him to proceed and put his questions to the witness, unless desired to state what he expects to prove.

There are many things which the witness excluded in this case might have proved, that would have constituted a separate defence for the other defendants, and as to which the witness had no interest. He might have proved the other defendants were not present or took no part in the rencontre, or that the plaintiff struck first and that they acted only in self-defence. Any of these matters would constitute an entire and perfect defence for the other defendants for whom alone he would have testified, and would have been entirely distinct and separate from the defence of the witness. The witness might still be found guilty, and the other defendants, on his testimony, might be acquitted. So, too, the witness would have been competent to testify as to admissions of the plaintiff, or as to any personal defence arising out of subsequent transactions, such as accord and satisfaction, &c., if it had been put in issue by the pleadings. So far, at least, I had supposed the practice at the circuit to be now well settled, that a defendant might testify in behalf of

his co-defendant. But the question has arisen, and some doubt has been expressed whether a defendant when called to testify for his co-defendant, can be examined to mitigate the amount of damages as against the defendants for whom he testifies. Upon the mere question of mitigation, where a cause of action is clearly made out against all the defendants, I do not see how one defendant can be a competent witness for his co-defendant, for that is a matter as to which he is jointly interested with his co-defendant, and it is, therefore, within the exception made by the statute. He is jointly interested, because the damages are not divisible. There can be but one verdict, and for one amount against all those found guilty. In *Halsey agt. Woodruff, et al*, (9 *Pick. R.* 555,) the jury, in an action of trespass, had in their verdict erroneously assessed damages against one defendant at \$2, and against the other at \$75, and the court gave judgment against them for the larger sum. This was clearly right. The damages not being divisible, each defendant was liable for all the damages sustained, without regard to different degrees or shades of guilt, and he would have been liable to the same extent if sued alone.

In trespass all are principals; and if, in such an action against two persons, they be proved guilty, and the plaintiff show that he has sustained damage to \$500 by their wrongful act, it would not avail one of the defendants that his co-defendant should testify, in his favor, that he had but little to do in committing the act complained of. If proved, it would not warrant any reduction of the amount of damages. Being concerned in the act, no matter to how small an extent, each defendant would be liable for the whole injury done by his confederates. Such evidence ought not, therefore, to be received. If confined in its operation to but one defendant, it would be immaterial, because it could have no legal weight; and if it had any legitimate tendency to diminish the amount of damages, it would be a matter as to which the witness was jointly interested with the other defendant, and should therefore be excluded.

If, however, the case made out against the defendant who is called as a witness is a doubtful one, I see no objection to

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receiving his testimony to mitigate damages for his co-defendants, under proper instructions to the jury, to consider it if they acquit the witness, and to reject it if they find him guilty. As the court cannot anticipate, in doubtful cases or in cases where there is a conflict of testimony, whether the defendant offered as a witness will be acquitted or convicted, the course I have suggested in such case seems to be necessary for the protection of the rights of the other defendants.

It is said to be difficult for a jury to separate, in their minds, the evidence given by a defendant for his co-defendant from the other evidence, so that the witness shall not himself be benefitted by his own testimony. This would be a proper consideration for the legislature, but not for this tribunal. It may be that in some cases the proper discrimination will not be made. The same difficulty exists where a maker and endorser are sued jointly on a promissory note, in which case precisely the same rule of evidence prevails. But the difficulty of discriminating and giving proper effect to the evidence is quite trifling compared with the greater evil of depriving a defendant sued with others of the same privilege of calling witnesses enjoyed by the plaintiff.

It was, perhaps, sufficient for the purpose of deciding this case to have discussed the question whether one defendant in an action for *tort* can in any case be a witness for his co-defendant; and it may have been unnecessary to inquire as to what particulars he may be examined. But it seemed to me appropriate to the discussion and a legitimate argument in favor of the construction for which I contend, to show that it secures to a defendant sued with another all of the rights of which he had been unjustly deprived under the late practice. His cause may now be tried so as to give him the benefit of all or of nearly all the testimony he would have had if sued alone. A construction that secures such a practical result is in accordance with the well-settled rule of law, which requires a remedial statute to be so construed, if possible, as to effectuate the contemplated reform.

It is enough, however, that each defendant was a competent

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witness in this case for his co-defendant: and the court below having erred in deciding otherwise, the judgment should be reversed and a new trial ordered.

JOHNSON, J., also read an opinion in favor of reversal, and DENIO and ALLEN, J. J., read opinions in favor of affirmance.

The judgment was reversed, Judges DENIO & ALLEN dissenting.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION FOR AN ATTACHMENT AGAINST LEWIS TAPPAN AND BENJAMIN DOUGLASS.

Where interrogatories in a commission from another state, addressed to two witnesses residing in the city of New-York, for the purpose of proving that the defendant in the action, as a member of the Mercantile agency, of which the witnesses were also members, had, in 1847 or 1848, made a certain communication to the agency, which they had exhibited, respecting the character and standing of the plaintiffs, for which they had brought their action for libel,—*held*, that the witnesses were not bound to answer, they having declined, on the ground that their answer might form a link in the chain of evidence which might tend to convict them of libel.

They were not bound to answer upon any supposed protection from the statute of limitations, as it did not appear but that the exhibition of the paper might have been within one year.

New-York Special Term, June, 1854. Application for an attachment for not answering interrogatories to a commission issued out of the court of common pleas of Huron county, Ohio, wherein Beardsley, &c., are plaintiffs, and Kinnan is defendant.

Lewis Tappan was in the Mercantile Agency in this city until 1849, when he sold out to Arthur Tappan and Benjamin Douglass.

The interrogatories seem to be based on the supposition that the defendant, in 1847 or 1848, was an agent of the Mercantile Agency, and then communicated to the agency in writing a statement of the character of the plaintiffs, which was libellous. The answers show (or it is understood) that it is the business

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of such an agency to record these communications, and to exhibit them to merchants inquiring as to the standing of the persons mentioned in them.

——— *for attachment.*

——— *opposed.*

MRTCHELL, Justice. The communications and the records of them may have been exhibited and so published (as the law terms it) every year since they were furnished; they may have been so exhibited by Lewis Tappan, although he has withdrawn from the business, and by Arthur Tappan and Douglass, who now have succeeded him, although they were not in the business when the communication was received. It is now asked of Tappan & Douglass if Kinnan made such a communication in 1847 or 1848; and they decline to answer, because the answer may form a link in the chain of evidence which may tend to convict them of libel. As the exhibition of the paper may have been within a year, the statute of limitations would be no bar to a prosecution for libel, and so the respondents are not bound to answer on account of any supposed protection to be derived from that statute. The witness alone knows the facts beyond those to be contained in the answer, which may tend to his conviction; the court is not to compel him to tell what those facts are. If, therefore, he says that the answer may tend to convict him, and on that account refuses to answer, and the court can imagine any state of facts under which the answer might lead to such a result, the witness may insist on the protection of the law and refuse to answer. If these witnesses should answer yes, such a communication was received from Kinnan at that time, and then state its contents, and other witnesses prove that within the last year Lewis and Arthur Tappan and B. Douglass exhibited the letter from Kinnan as evidence of the plaintiff's character, the proof of these respondents' guilt might be made out, when, without their answer, there might be no evidence of the contents of the letter.

Examinations of witnesses under commissions from other states may be much abused, unless ample protection be given

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to the witnesses by our courts; and when the witnesses may be subjected to a civil suit in consequence of their answer, and (as in case of a libel which may be published in different states) may be subject to indictments in different states, and then not protected by any statute of limitations on account of non-residence in those states, our courts should use a jealous care to protect them. The honest ought not to be forced to be their own accusers, nor the dishonest to be tempted to perjury in order to save themselves.

In the *People agt. Mather* (4 Wend. 254) the rule as to the kind of questions which the witness may decline answering is clearly stated; and notwithstanding the broad language used in the statute, the chancellor decided in a similar case (1 Paige, 607, in the matter of Kip) that "the witness is not obliged to criminate himself, or answer any question which he would not be bound to answer if examined in open court; that the legislature never intended to establish an inquisition by which witnesses should be compelled to criminate themselves, or to disclose secrets in which the parties to the examination had no interest."

The other interrogatories are as objectionable as the one above specially referred to. The motion for an attachment is denied.

SUPREME COURT.

MEAD, Guardian, agt. FLORENCE.

Where an *answer* is merely defensive,—that is, where it asks no affirmative relief, a *demurrer* to it will not lie. (*Code*, 1852.)

New-York Special Term, January, 1854. Demurrer to answer.—This is an action against Florence as surety of Boudinot on an administration bond.

Boudinot was ordered by the surrogate to pay over certain moneys, and failing to do so, the bond was directed to be assigned to the plaintiff to be put in suit.

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In his answer, Florence seeks to call in question the orders of the surrogate—and to this part of the defence the plaintiff demurs.

——— *for plaintiff.*

——— *for defendant.*

ROOSEVELT, Justice. Both parties, it appears to me, are under a misapprehension as to the proper practice. They seem to have overlooked the important amendment made in the Code in 1852, rendering previous decisions, in this particular, inapplicable.

Questions on an answer, unless it contain a set-off or some other counter-claim on the part of the defendant, cannot now be raised by demurrer.

Where an answer is merely defensive, in other words where it asks no affirmative relief, the issue, without further pleading in the shape of reply, demurrer, rebutter, rejoinder, surrebutter, &c., is considered sufficiently joined for the purpose of trial, and the deficiencies, if any, are to be made up by proof.

The plaintiff's demurrer, therefore, as a pleading, must be stricken out.

It may be well, however, in view of the points raised by the defendant's counsel, to observe that by the 159th section of the Code, pleadings are required to be liberally construed, with a view not to form, but to "substantial justice between the parties;" and that by the 161st section of the same Code, it is provided that, in stating a judgment or other determination of a court of special jurisdiction, (such as the surrogate's,) it shall be sufficient to aver that it was "*duly* given or made."

Unless the parties, after these intimations, wish to amend or to present testimony, I shall consider the cause as having been brought to trial on the pleadings as they stand, (without the demurrer,) and shall make a decision accordingly.

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SUPREME COURT.

THE NEW-YORK FIRE AND MARINE INSURANCE COMPANY
agt. BURRELL AND OTHERS.

An extra allowance given in a foreclosure suit, where a tender had been made before judgment, of the amount due, with interest and costs to the time of making the tender.

The additional allowance is not in the nature of costs incurred subsequent to the tender.

New-York Special Term, July, 1854. Motion for additional allowance.

——— *for motion.*

——— *opposed.*

CLERKE, Justice. The question to be considered on the present occasion is, whether a plaintiff is entitled to an allowance additional to his ordinary costs, where a tender has been made before judgment of the amount due, with interest and costs to the time of making the tender?

Payment of money into court was the only method by which a defendant could by common law, after the commencement of the action, save himself from subsequent costs. By statute, however, (2 R. S. 553, § 20, *marginal*,) the defendant may at any stage of the proceedings, in actions at law, before trial, in certain cases, tender to the plaintiff or his attorney sufficient to satisfy the demand, together with the costs to the time of making the tender; and if it should appear on the trial, that the amount so tendered was sufficient to pay the demand and the costs, the defendant shall not be entitled to pay costs, incurred subsequent to the tender.

1. Does this provision apply to a foreclosure suit, so as to preclude the plaintiff, if he refuses to accept the amount, from the benefit of an extra allowance? In the present case the tender was made the day before the plaintiff was entitled to judgment, when nearly all the trouble and responsibility of prosecuting the action had been incurred. The defendant

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maintains, that having made the tender the plaintiff is not entitled to judgment, and as the Code (§ 808, 2d paragraph) in foreclosure suits provides for an additional allowance only where judgment has been obtained, the court can grant no such allowance in this case; and, *secondly*, they cannot grant it, even if the plaintiff is entitled to judgment; as this would be tantamount to allowing costs incurred subsequent to the tender.

This being a technical objection, it is insisted that it should be technically scanned, and that the advantage, which it claims, should be yielded only if there is no doubt that the statute, giving the right to make a tender subsequent to the commencement of the action, is applicable to this case.

The statute expressly refers to *actions at law*; and it was never pretended, before the Code, that it had any application to foreclosure suits, which were always commenced in chancery: and, I confess, that I see no reason why we should stretch the statute, in the absence of any express provision, under the dubious supposition that to do so would be impliedly consistent with the spirit and tenor of the Code. It is, moreover, possible, that the legislature intentionally omitted any alteration on the subject; as in foreclosure suits the interests of the parties are often so difficult as to require the direct interposition of the court, even when the owner of the equity of redemption is prepared to pay the amount due.

Besides, even if the statute may be deemed to apply to foreclosure suits, the plaintiff is not prohibited from prosecuting his action to judgment after the tender has been made. It only denies him costs incurred subsequent to the tender; and, if entitled to judgment, an additional allowance may be given, unless such allowance is tantamount, within the meaning of the statute, to "*costs incurred subsequent to the tender.*"

Is the additional allowance in the nature of costs incurred subsequent to the tender? The allowance, doubtless, cannot be made except when the judgment has been obtained. But this refers only to the condition or circumstances under which it shall be made; it does not intimate that the services for which it is made are rendered after the judgment. It does not follow,

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therefore, that this additional allowance is to be deemed equivalent to costs incurred subsequent to the tender. The allowance is made for services commencing from the institution of the action, which are generally more important and onerous in the first than in the subsequent stages. It is, in fact, made for services performed throughout the prosecution of the action, rather than for services rendered at any particular stage of it, and certainly not exclusively for services rendered after the judgment has been obtained.

The allowance, therefore, is not asked for costs *incurred* subsequent to the tender; but having obtained his judgment, to which, notwithstanding the tender, I consider him entitled, the plaintiff asks for an allowance additional to his ordinary costs, to compensate him for the expense and trouble which he has incurred from the commencement of the action throughout all the stages of it; and, as in all cases of this nature, involving as they do considerable labour and responsibility, and requiring no small degree of legal skill, I deem an extra allowance proper, I can see no reason why it should not be granted in the present case.

Let the plaintiff have \$50 as such allowance.

SUPREME COURT.

**THE TRUSTEES OF THE VILLAGE OF PENN YAN agt. TUELL
& WATSON.**

Where on application of the defendant the cause is put over the circuit on payment of \$10 and disbursements, which are paid the plaintiff on recovering a verdict, is not entitled in his general bill of costs to \$10 for that circuit.

Yates Special Term, May, 1854. Motion for readjustment of costs.—The plaintiffs recovered a verdict of \$50 at the last April circuit in Yates county, and perfected judgment thereon. The action was noticed for trial at the last October circuit in the same county, and was put over on application of the de-

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defendants upon payment of ten dollars and disbursements, as a condition of the postponement, which were then paid by them. The plaintiffs charged in their general bill the sum of ten dollars, costs of the said October circuit, which was objected to before the clerk on the ground that it had been paid on putting off the trial at that circuit; but the objection was overruled by the clerk, who included the same in his adjustment of the costs for which judgment was entered.

A. V. HARPENDING, *for defendants.*

W. S. BRIGGS, *for plaintiffs.*

WELLES, Justice. The costs must be re-adjusted. The plaintiffs have received the ten dollars in question, and it would be manifestly unjust to allow them to recover it again. There is nothing in the statute that I can perceive requiring the defendants to pay it the second time. The Code (§ 307) specifies the items which a party shall recover when entitled to judgment for costs. Subd. 8 of the section referred to is as follows: "To either party, for every circuit or term at which the cause is necessarily on the calendar, and not reached or postponed, excluding that at which it is tried or heard, ten dollars." Section 314 is in the following words: "Where an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding \$10, besides fees of witnesses, may be imposed as the condition of granting the postponement."

The plaintiffs' counsel supposes, that inasmuch as by § 814 the amount, besides fees of witnesses, which the party may be required to pay as a condition of the postponement, may be less than \$10, and as subd. 8 of § 307 allows \$10 for the term, in the general bill, the payment of a less sum, as a condition of the postponement, is not to interfere with the right of the prevailing party to include in his judgment the \$10 allowed by said subd. 8.

The allowance of \$10, under the last mentioned subdivision, cannot be made where the cause is either reached or postponed. In that part of the subdivision which is in these

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words, "and not reached or postponed," the adverb "not" should be understood as qualifying both the verbs "postponed" and "reached." This construction is the reasonable and equitable one, and its correctness placed beyond doubt by the fact, that by the Code of 1849, and as published by the secretary of state in 1851, in the said subdivision 8 of § 307, the language is, "and not reached or is postponed," &c., and the amendments of 1852, now in force, omit the word "is" in the corresponding subdivision, thus completely changing the sense. (*Sess. L. of 1849, p. 677; do. of 1851, p. 904, § 2; id. Appendix, p. 104; and do. of 1852, p. 660.*) When the cause is reached on the calendar, it is the party's own fault if he does not try it, provided he has noticed it for trial, unless postponed on the application of his adversary; in which case the court will take care that he shall be indemnified on the spot for the costs and expenses of the term.

SUPREME COURT.

HARRIS agt. MULOCK AND WIFE.

Where there is no place appointed, either in the bond or mortgage at which the principal or interest is to be paid, the debtor is bound to seek the creditor to make his payments; it is not a case where a *demand* is necessary before suit brought.

Where the creditor went to the office of the debtor to receive payment of a bond and mortgage, and while in the act of counting one of several packages of bank bills delivered to him by the debtor as payment, suddenly left the office, for the reason, as he alleged, that insulting language was used toward him by the debtor,—*held*, that the money not being current coin would not be a tender, had the creditor objected to it for that reason; therefore, to constitute that money a tender, the debtor must have given the creditor time sufficient to enable him to ascertain whether the money was of such description as he would be willing to receive, instead of current coin.

Also *held*, that from the evidence, the creditor was justified in leaving as he did; the debtor, therefore, had not made a sufficient tender, and was bound to seek the creditor for that purpose.

Harris agt. Mulock and wife.

New-York Special Term, November, 1853. Motion for judgment on complaint, answer and replication in foreclosure case.

On the 30th of April, 1836, the plaintiff, Samuel Harris, purchased of Thomas McKie, executor of Daniel Clark, the house and lot No. 400 Hudson-street, in the city of New-York, for \$6,800: he paid \$3,300 in cash, and gave his bond, secured by his and his wife's mortgage upon the premises for \$6,000 penalty, conditioned to pay \$3,000 on the 1st of May, 1841, with 6 per cent. interest, payable half-yearly on the 1st of May and November in each year.

• The deed and mortgage were duly recorded.

1836. 19th December. The plaintiff, Samuel Harris, and Amanda his wife, conveyed the property to Maria Wood, now Mrs. Mulock, for \$7,000, \$4,000 of which was paid in cash, and Mrs. Wood, now Mrs. Mulock, assumed to pay Harris's bond and mortgage of \$3,000 to Mr. McKie: the deed of Harris and wife to Mrs. Wood contains a clause expressly to that effect.

Mrs. Wood also executed to Mr. Harris a covenant to indemnify him and his representatives from all damages and liabilities growing out of his bond.

The deed from Harris and wife was duly recorded.

1842. June 18. Mulock and wife paid to McKie \$1,000 of the principal on the bond and mortgage.

1843. December 31. McKie assigned the bond and mortgage to David Clark.

1848. October 18. David Clark assigned the bond and mortgage to Herbert Hall.

Both these assignments were duly recorded.

The assignments to Hall were for the benefit of Samuel Harris. Harris furnished the consideration; he had the assignment, with Hall's permission, taken in the name of Hall, because he feared if he took it directly to himself, it might be deemed a payment, and he would lose his lien upon the lot and house, if not his claim.

No place is designated either in the bond or mortgage at which payment is to be made.

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1850. About the middle of May, the plaintiff, Samuel Harris, called at the office of William Mulock, and stated to Mr. Mulock: "I have been informed by Mr. Herbert Hall that you (Mulock) desire to pay off the mortgage upon the house in Hudson-street." Mr. Mulock replied, "Yes, that is so. I have provided myself with the necessary funds for that purpose, intending when Mr. Herbert Hall calls for the interest money due on the 1st of the month, to pay him the principal and interest." Mr. Harris replied, "The mortgage belongs to me; I furnished the funds to take it up, and was advised to take the assignment in the name of Mr. Hall: he has no interest in it now." To which Mr. Mulock replied, "Very well, sir; then I must pay you, I suppose. I have the funds lying by me idle; we may as well arrange it now." Mr. Harris replied, "I am not ready now." Mr. Mulock asked, "When can you be ready?" Mr. Harris replied, "On the 29th."

A few days after this interview of the middle of May, 1850, Mr. Mulock, in his office, handed to Mr. Evans the packages of bank bills which will be hereafter mentioned, to place for safe keeping in his, Mr. Evans's, iron safe, which is the first these packages of money appear in this matter.

1850. May 28. Mr. Herbert Hall assigned the bond and mortgage to Samuel Harris, the plaintiff.

1850. May 29. Mr. Harris again called at the office of Mr. Mulock, according to the previous appointment, and took a seat beside a small table. Mr. Mulock placed upon the table before Mr. Harris ten or twelve packages of bank bills; each package contained a large number of bills; the label of each package was marked with the amount of money it contained; the bills, through all the parcels, were of the denomination of ones and twos, with an occasional ten and twenty; the aggregate amount of money in all the packages was \$2,100; there were \$7 uncurrent money contained in the packages, which had the general appearance of the current bills of the city.

As Mr. Mulock laid these packages of bills upon the table, on the top of each other, he observed: "Sir, there are \$2,100,

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something more than the amount of your claim; count it, and take out what is coming to you."

Mr. Harris took up and counted the upper package, and was in the act of recounting the same package, not having yet touched any of the other packages, when Mr. Mulock inquired, "How much do you make the interest?" Mr. Harris leaned toward some papers near him on the table, and said, "Eighty dollars, wanting some cents," or, "Eighty dollars and some cents." Mr. Mulock observed, "You are not going to charge me interest after the time I offered to pay you the money?" Mr. Harris replied, "I demand interest up to to-day." Mr. Mulock said, "Very well, I will pay you the amount you demand; but I must say, that under the circumstances, I consider it but *little better than extortion*." Whereupon Mr. Harris dropped the package of bills he had in his hands, gathered up his papers, put on his hat, and made for the door. Mr. Mulock observed, "I want no difficulty with you: I repeat, I will pay you the amount you claim; I do not want to be delayed any longer in this matter." Mr. Harris proceeded, and as he opened the door, he said, "If you want me, you must come after me." These facts are found from the testimony of Mr. Evans, the only witness to the occurrences at the interview between the parties.

———— *for motion.*

———— *opposed.*

MORRIS, Justice. From the facts proved by Mr. Evans, I must determine whether a tender was made by Mr. Mulock.

In this case the money placed upon the table was not current coin of the state, and would not be a tender, had Mr. Harris objected to it for that reason; therefore to constitute that money a tender, Mr. Mulock must have given Mr. Harris time sufficient to examine the money to enable him to ascertain whether the money was of such description he would be willing to receive, instead of current coin, in satisfaction of his demand.

There being no place appointed either in the bond or mort-

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gage at which the principal or interest was to be paid, the debtor was bound to seek the creditor to make his payments, not the creditor to seek the debtor to receive payment: it is not a case where a demand was necessary before suit brought: a suit could have been instituted and sustained without previous demand of payment; therefore Mr. Harris was under no legal obligation to be in Mr. Mulock's office, for the purpose of receiving what was due to him, as would have justified his remaining there to get the money, after he should be ordered out; neither was he so bound to receive his money at that place, as to compel him to remain and receive insult until he could get his money. Mr. Harris's call at the office of Mr. Mulock was an act of accommodation to Mr. Mulock, and he was not bound to remain there one moment beyond the period Mr. Mulock should commence to treat him discourteously.

The fact that Mr. Harris called at the office of Mr. Mulock, instead of instituting a suit, or compelling Mr. Mulock to seek him out, shows he was actuated from a spirit of accommodation; and the fact that Mr. Harris commenced to count packages of bills composed of ones, twos, tens, and twenties, amounting to \$2,100, for the purpose of taking out of them \$2,080 and some cents, or \$2,079 and some cents, shows an entire absence of captiousness on his part, for had he been captiously inclined, all he would have been obliged to say was, "I refuse bills."

Mr. Mulock used the insulting words to Mr. Harris, proved by Mr. Evans, before Mr. Harris had satisfactorily accomplished the count and examination of the first package of bills. He was not compelled to remain after that insult, consequently Mr. Mulock did not give him time sufficient to be called upon to say whether or not he would receive the bills, instead of the current coin to which he was entitled by law.

The plaintiff in this suit is the owner of the bond and mortgage described in the complaint, and of the amount due thereon, and the same is a lien upon the property of the defendants mentioned therein.

There has been no tender proved.

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The plaintiff is entitled to judgment according to the prayer of his complaint for the amount of principal and interest up to this date due on the bond and mortgage.

I refer the computation of interest to Mr. Dunsenbury, one of the clerks of this court. He will compute interest on two thousand dollars from 1st of November, 1849.

SUPREME COURT.

**THE NEW-YORK LIFE INSURANCE & TRUST COMPANY agt.
ABRAHAM CUTLER AND WIFE, GEORGE M'LANE AND WIFE,
PETER YOUNG, AND TWENTY-THREE OTHERS.**

A writ of assistance may be issued ex parte without service of notice for the order. (So held in 8 How. Pr. R. 35.)

A decree of foreclosure which directs that the purchaser or purchasers at the sale be let into the possession of the mortgaged premises sold, and that any of the parties in the cause who may be in possession of said premises, and any person who, since the commencement of the suit, has come in possession under them, or either of them, deliver possession, &c., does not authorize the removal of a tenant in possession, who became such after the commencement of the suit, where such tenant holds under a person not a party to the suit who was lawfully in possession under a claim hostile to that derived from the mortgage; although the tenant was made a party to the suit for the purpose of reaching an interest, in right of his wife, in other premises in the mortgage of which he was in possession, and which possession he had delivered up in pursuance of the decree.

That is, the tenant having obeyed and satisfied the requirements of the decree, *quoad* its effect upon him, was afterward at liberty to go into possession of the other mortgaged premises under a person who was not a party to the foreclosure suit, in the actual possession, as owner, claiming title in hostility to that derived through the mortgage foreclosure, without being liable to be turned out by virtue of the decree which had expended its force with regard to him.

A landlord, not a party to a foreclosure suit, and claiming title in hostility to that derived through the foreclosure, is not bound by the decree, although his tenant, who is made a party, surrenders possession of the premises to him after the decree.

Yates Special Term, November, 1853. Motion to set aside writ of assistance, &c.—On the 29th day of November, 1832,

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the defendant, Abraham Cutler, executed his bond to the plaintiffs, conditioned to pay them \$4,000 in the manner therein mentioned, and at the same time said Cutler and his wife executed their mortgage to the plaintiffs upon two certain farms therein described, one of which was situated in the town of Lodi, Seneca county, and the other in Hector, Tompkins county, as security for the payment of the moneys mentioned in said bond.

The above action was brought in the late court of chancery to foreclose this mortgage, and a decree of foreclosure entered therein before the assistant vice-chancellor of the first circuit, dated September 30th, 1846. The decree confirms the report of the master, which bears date June 24th, 1846, whereby, among other things, the sum of \$5,738.66 is reported to be due to the plaintiffs on the bond and mortgage,—directs the mortgaged premises sold, or so much as should be necessary to raise the amount due, with interest, costs, &c.; and among other things contains the following provision: "And it is further ordered and decreed that the purchaser or purchasers of the said mortgaged premises at such sale be let into the possession thereof; and that any of the parties in this cause, who may be in possession of the said premises, or the parts thereof which shall be sold, and any person who, since the commencement of this suit, has come in possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the master's deed for such premises, and a certified copy of the order confirming the report of the sale, after such order has become absolute." All the defendants, excepting Abraham Cutler and wife, were made parties upon an allegation in the bill of complaint, that they had or claimed some interest in the mortgaged premises, or some part thereof as purchasers, mortgagees or otherwise, subsequent to the execution of the said mortgage. An appeal from the above decree was dismissed by the supreme court at general

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accordingly by such sheriff. This deed was duly acknowledged on the 14th of February, 1852, and recorded in the office of the clerk of Seneca county on the same day. On the 12th day of April, 1852, the plaintiffs (the grantees in the last deed) conveyed the same premises to Elijah Baker by deed of that date, which was duly acknowledged on the 19th of the same month, and on the 21st of the same month duly recorded in the same clerk's office. On the 21st of February, 1853, Baker and wife conveyed the same premises to Daniel Tyler by deed of that date, which was duly acknowledged on the 22d of the same month, and recorded in the same clerk's office, March 7th, 1853.

On the 20th of October, 1853, an affidavit was made by William H. Gibbs on behalf of said Tyler, showing that George M'Lane, one of the defendants in the foreclosure suit, was then in the possession and occupancy of the said Lodi farm; that on the same day (October 20th, 1853) the deponent, in company with Tyler, went on the premises, and after exhibiting to said M'Lane a certified copy of the decree, a certified copy of an order confirming the sheriff's sale, and the several deeds above mentioned, duly and regularly acknowledged and recorded, demanded of said M'Lane, with all due formality, the possession of the said premises, (the said Lodi farm,) and every part thereof, and that said M'Lane refused to give up possession, &c. The same affidavit contained a statement of Tyler's title as above set forth.

On this affidavit a motion was made at a special term held in Yates county before Mr. Justice SELDEN, on the third Monday of October, 1853, *ex parte* without notice to any one, for a writ of assistance, &c., which motion was granted, and an order entered accordingly.

A writ of assistance was thereupon issued, by virtue of which the sheriff of Seneca county, on the 25th day of October, 1853, removed the said M'Lane, and put the said Tyler in possession of the said Lodi farm.

A motion is now made in behalf of the said M'Lane for an order setting aside the writ of assistance and the order upon

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which it was issued, and to restore the possession to M'Lane. This motion is founded on various affidavits, tending to show that Andrew J. Cutler, who was not made a party to the foreclosure suit, being in possession of the Lodi farm, and claiming to be the owner thereof, by an agreement in writing, dated March 19th, 1853, leased the same for one year to the said M'Lane, upon certain terms therein mentioned, and that M'Lane entered in pursuance thereof, and continued in possession of said farm, cultivating the same until he was removed by the sheriff by virtue of the writ of possession as before stated: that the said M'Lane was made a party-defendant in the foreclosure suit by reason only of an interest which he claimed in right of his wife as an heir-at-law of Noadiah Shannon deceased, in that part of the mortgaged premises consisting of the said farm in Hector, Tompkins county; and that after the said decree of foreclosure was made, and in the spring of 1852, being informed that Baker had purchased said land or the decree, and at the request of Baker and those claiming under him, he surrendered the possession of said premises, and removed therefrom, and has not since claimed any possession or right of possession, or been in the constructive or actual possession of the said farm in Hector, since which time said Baker and those claiming under him have been in the actual and peaceable possession thereof: that after said M'Lane surrendered the possession of the farm in Hector, he resided in that town with his family until he went into possession of the farm in Lodi, under the lease from Andrew J. Cutler as before stated, and which is the only possession which he has ever had or claimed of the said Lodi farm.

Affidavits were read on this motion with a view of showing Andrew J. Cutler's right to the Lodi farm, and his possession of the same, which are referred to in the opinion of the court, as far as is necessary for the proper understanding thereof.

O. HASTINGS & M. S. NEWTON, *for the motion.*

E. VAN BUREN & WM. H. GIBBS, *opposed.*

WELLES, Justice. One ground of the motion is, that the

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order for the writ of assistance was obtained *ex parte*, and without notice. That question was settled in the case of the New-York Life Insurance & Trust Co. agt. Rand, (8 *How. Pr. R.* 85,) affirmed on appeal to the general term, (*Id.* 352,) where it was held that notice of the application was unnecessary. In this case, the order appears to me to have been in all respects regular. Every thing was shown in the affidavit upon which it was granted required by the law or the practice.

But there is another question, which is raised upon the affidavits produced on the present motion, of much more grave importance. It is shown by the affidavit of Peter Young, one of the defendants in the foreclosure suit, that about fifty-nine years before the date of the affidavit, he purchased the premises in question (the Lodi farm) of one Peter Ten Brook, and shortly afterward moved on to it with his family, where he and they continued to reside, without interruption or change of actual possession, until about five years since, when Henry D. B. Cutler showed him a deed for the premises from John I. Young to said H. D. B. Cutler and others, and requested the deponent to leave said premises, which he accordingly did, and said Cutler took possession. The same affidavit states that about thirty years since, the said premises were sold by the sheriff of Seneca county by virtue of an execution issued upon a judgment in the supreme court, against him the said Peter Young and the said Abraham Cutler, at which sale Henry D. Barto was the purchaser: that shortly afterward Barto sold the same premises to Jacob I. Young and John I. Young of the state of New-Jersey: that shortly after that, the said Jacob I. & John I. Young executed to the deponent (the said Peter Young) a lease in writing for the farm, upon which he continued to reside, and pay rent to the lessors, until the said Jacob I. Young released his interest therein to said John I. Young, after which he paid the rent to the said John I. Young as long as he occupied the farm. This affidavit is corroborated by that of his daughter Catherine Cutler, the wife of Abraham Cutler. The affidavit of Andrew J. Cutler states that he was one of the grantees in the deed from John I. Young

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to H. D. B. Cutler and others, which bore date May 22, 1847, for the premises in question: that he purchased the interest of H. D. B. Cutler in said land, and took possession of the same by virtue of his interest, about January 20th, 1849, and about the 10th of February, 1850, leased the farm to one Arthur Broderick for the term of three years, and that since that time he has purchased the interest of the remaining grantees in the said deed from John I. Young, making the entire title in said farm; and that in March, 1853, he leased the said farm to the said George M'Lane for one year, who entered and held until removed as before stated.

It is urged, in opposition to the motion, that as M'Lane was a party to the foreclosure, he was liable to be removed under the authority of the decree. This is answered as I think conclusively, as far as respects this motion, by the fact that after the decree, and purchase by Baker, he surrendered all the possession he had of the mortgaged premises. After that, he had the same right to acquire and retain the possession as if he had not been a party to the foreclosure suit. There is no reason why he should not, as he had obeyed the decree and submitted himself to its requirements; and if he afterward found a person, who was not a party to the foreclosure suit, in the actual possession as owner, claiming title in hostility to the title through the foreclosure, he was at liberty, in my judgment, to go into possession under such person, without being liable to be turned out by virtue of the decree of foreclosure, which had already expended its force with regard to him. It cannot be deemed to have the effect of a perpetual injunction upon him in relation to the possession, without reference to subsequently acquired rights, but must be restricted to such rights as the decree is presumed to have settled. In this case M'Lane was in possession when the writ of assistance was executed, as tenant to Andrew J. Cutler, who was not a party to the foreclosure suit, and the question, I think, must be regarded in the same light as if Andrew J. Cutler had been in possession previously, and was the person who had been removed, and was now making the present motion. The moving affi-

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affidavits show,—and the contrary is not proved by the opposing affidavits,—that Henry D. B. Cutler received possession of the premises in question about five years ago from Peter Young, one of the defendants in the foreclosure suit, who, it appears, had, since long before the date of the mortgage, occupied them as tenant to the persons from whom the said Andrew J. Cutler claimed to derive his title. The latter, therefore, stands independent of the foreclosure suit or the decree made therein, and cannot be dispossessed in this summary manner, not being bound or affected by the decree.

I have considered the question whether, as H. D. B. Cutler received the possession of the premises from Peter Young, one of the parties to the foreclosure suit, and since the commencement of that suit, he and his grantee, Andrew J. Cutler, should not be regarded as standing in privity with the said Peter Young, and thus concluded by the decree, inasmuch as this is a question of possession merely. If A. J. Cutler had derived his title from Peter Young, or, in the language of the decree, had come into possession under him, after the commencement of the suit, I think this would undoubtedly have been the consequence. But that is not the case; on the contrary, he derived his claim from persons to whom Peter Young had sustained the relation of tenant a long time before the mortgage was given. His relation was that of assignee of the landlords of Peter Young, and the possession of the latter was their possession, and an attornment by him to any other person than his landlords, pending that relation, would have been void.

It is of importance to look at the nature of the possession of Peter Young, which he surrendered to H. D. B. Cutler. If it had been a possession in his own right, he being a party to the decree, any person taking possession from or under him would have been bound by the decree and liable to be removed the same as Peter Young himself. But his possession, being as tenant to the individual to whom he surrendered, the surrender was merely an act of loyalty to his landlord, who, not being a party to the suit, was not, I think, bound by the decree. Of course, I do not assume to decide or intimate who has the title or best

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claim to the premises. That question must be determined by an action. All I intend to decide in this connection is, that Andrew J. Cutler, under the circumstances, is not bound by the decree; and that M'Lane, although a party to the suit for the foreclosure of the mortgage, having satisfied the judgment therein, *quoad* its effect upon him, was at liberty to enter under A. J. Cutler, who was lawfully in possession under a claim hostile to that derived from the mortgage.

In this case, so far from H. D. B. or A. J. Cutler coming into possession under Peter Young, he was in possession under their grantors.

Upon the whole, I think the motion should be granted to vacate the order for the writ of assistance, and the writ be set aside, and the possession be restored to M'Lane.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF HENRY E. BARTLETT.

An application by a successor in office for the delivery over to him of the books, papers, &c., of his predecessor removed from office, (1 R. S. 124, §§ 50, 51,) although it involves the questions of the legality of the removal of the one and the appointment of the other, does not prevent either party from resorting to the more solemn and formal method of redress by *action*. The remedies are concurrent; the one is summary, preliminary, and partial in its operation, the other is final and complete, and comprehends all the profits and benefits of the office.

The governor under the statute has the sole and exclusive power of *removal* and *appointment* to office *during the recess of the senate*. The constitution of 1846, or any legislation since, has not changed the statute upon this subject as it then existed.

New-York Special Term, May, 1854. This is an application to compel Richard L. Morris to deliver over to Henry E. Bartlett all the books and papers in his custody, as health-officer of the city of New-York, or in any way appertaining to the office.

It appears that Dr. Morris was nominated health-officer by the governor, and appointed by him with the consent of the

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senate, on the 17th of February, 1852, for the term of two years, and that on the 21st of the same month he subscribed and filed with the clerk of the city and county of New-York the oath of office prescribed by law.

On the 21st of April last the governor issued a supersedeas, removing Dr. Morris from this office, which was on that day duly served on him, and on the 22d of the same month Dr. Bartlett was appointed and commissioned as his successor; and he duly filed his commission with the clerk of the city and county of New-York, and took and subscribed the oath of office on that day. On the 25th of April a written notice was personally served on Dr. Morris, demanding the delivery to Dr. Bartlett of all the books and papers in his custody as health-officer, and everything appertaining to the office, and to give him possession of the same. This Dr. Morris refused to do, under the advice of counsel, on the ground that the senate was continuously in session for the period of the expiration of the term for which he was originally appointed (the 17th of February, 1854) until the 17th of April, 1854, and that the governor having neglected to appoint a successor *during such session of the senate*, had no power to make the appointment *without their consent*, and that under the law (1 R. S. 115, § 9, 1st ed.) authorizing incumbents to hold over until their successors should be duly appointed, he continued legally in possession.

SAMUEL BEARDSLEY & WM. CURTIS NOYES, *for application.*
CHARLES O'CONOR, *opposed.*

CLERKE, Justice. I. The first objection made on behalf of Dr. Morris is, that this is not the proper remedy, and that the only mode of inquiring into this controversy is by an action equivalent to what was formerly known as a proceeding by information, in the nature of a *quo warranto*.

Doubtless, the whole question of the right to the office—the validity of the removal of Dr. Morris and of the appointment of Dr. Bartlett—is involved in the present proceeding. It constitutes an essential element of it, and the result of this application will exclusively depend on the conclusion to which I shall

arrive, as to which of the contestants is entitled to the office. But does the right to proceed by action render this proceeding unnecessary, or inapplicable to the circumstances of this case?

The statute is very explicit. (1 R. S. 124, §§ 50, 51, 1st ed.) It says: "Whenever any person shall be removed from office, &c., he shall on demand deliver over to his successor all the books and papers in his custody as such officer," &c. "If any person shall refuse or neglect to deliver over to his successor any books or papers, &c., such successor may make complaint thereof to the chancellor, to any justice of the supreme court, &c.; and if such officer be satisfied by the oath of the complainant and such other testimony as may be offered, that any such books or papers are so withheld, he shall grant an order, &c."

Here the *object* is to compel the delivery of the books and papers by a summary proceeding, to which any person duly appointed to an office is absolutely entitled without any qualification or reservation. The only questions to be ascertained by the judge, to whom the application is made, are, has the predecessor been legally removed, and has the claimant been legally appointed?

But surely it does not follow, because such an application is permitted and entertained, that it supersedes the more regular and formal redress by action. The remedies are concurrent; the one is summary, preliminary, and partial in its operation; the other is final and complete, and comprehends all the profits and benefits of the office. This summary application bears analogy to many of our most familiar *provisional* remedies. For instance, in an application for an injunction, the judge has to anticipate and in a manner to predetermine the result of the controversy, before he grants the order; he has to satisfy himself even on *ex parte* statements of the validity of the claim; but this by no means interferes with the due progress of the controversy to a complete and final adjudication in the regular course of judicial inquiry; and in the present application, whatever may be my decision, it cannot operate in any respect to prevent either party from resorting to the more solemn and formal method of redress by action.

I have no doubt, therefore, that this proceeding is regular, and that the only question for me to consider is, whether the removal of Dr. Morris, and the subsequent appointment of Dr. Bartlett, are valid.

II. The power of removal by the governor and of appointment by him during the recess of the senate seems to be incontrovertible; unless the constitution of 1846 has modified or repealed the law as it then existed. With regard to this very office of health-officer, the statute expressly says, (1 R. S. 115, § 17, 1st ed.,) he "may be removed by the governor during the recess of the senate;" and with regard to offices generally, (1 R. S. 123, § 42, 1st ed.,) "the governor may supply all vacancies that may happen during the recess of the senate." And how, among other modes, may a vacancy happen? The statute (1 R. S. 122, § 37, 1st ed.) enumerates seven methods in which vacancies may occur; and the third which it specifies is, "removal from office." The power, then, of removal and appointment "during the recess of the senate" is given, in the most positive terms, unconditionally and without qualification. Can it be alleged that he cannot remove of his own arbitrary will, without sufficient cause, and that this cause must be so palpable as to impose upon him the accountability of judicial action, and render such action reversible by any other authority? Where is the authority which the law has provided for that purpose? None can be found, for none was intended; the exercise of the power was necessarily left to the exclusive judgment and discretion of the chief executive authority; and whatever might have been his motives, on which it is entirely beyond the sphere of my duty to speculate, he is subject to no control, except his own sense of propriety and duty. I believe it is conceded that both of the present contestants are professionally competent, and as members of society unquestionably worthy and irreproachable; but, even if it were otherwise, and it were clearly manifest that the successor was greatly inferior both morally and professionally to his predecessor, this circumstance could in no degree interfere with the validity of the removal or the appointment, much less can it be affected

by the circumstance, that although the governor had an ample opportunity of obtaining the co-operation of the senate from the expiration of Dr. Morris's term until the adjournment of that body, yet he deferred action on the subject until after that event. Whatever may be the relative qualifications of the parties,—whatever may be the circumstances attending the removal of the one and the appointment of the other,—whatever may be the motives by which others may suspect him to have been actuated in his course on this occasion, the law gives no other authority any right to speculate upon those motives, or to disturb that action. The faithful performance of duty in this respect is like many other duties which are necessarily what may be denominated duties of "imperfect obligation;" they are not cognizable by law, because they could not be practically enforced by law, or rather because the attempt to do so would produce much more mischief than the evil sought to be remedied.

The statute, as it existed in 1846, when the present constitution was adopted, having given to the governor the sole and exclusive power of removal and appointment *during the recess of the senate*, has that instrument, or has any law subsequently enacted, made any alteration in the law?

That constitution (*Art. I, § 17*) provides that such acts of the legislature as were then in force shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning them, abrogating expressly, indeed, such acts as are repugnant to it. *Art. X, § 2*, provides that all officers, whose election or appointment is not provided for by the constitution, &c., shall be elected by the people, or *appointed as the legislature may direct*; and sections 5, 7, and 8 of the same article empower the legislature to provide for filling vacancies in office, to provide for the removal from office, and to declare the cases in which any office shall be deemed vacant, when no provision is made for that purpose in the constitution. This, of course, gives the legislature complete control over those subjects; but it makes no change whatever in the laws which the legislature had previously enacted in rela-

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tion to them; for these, like all other laws in force at the adoption of the constitution, were to continue in force, subject to such alterations as it may think proper to make, (*Art. I, § 17.*) Those sections are entirely consistent: if the legislature have not deemed it expedient to *direct* any new mode of appointment or removal, or of filling or creating vacancies, they *direct*, to all intents and purposes, that the laws existing on those subjects in 1846 should continue as they were; and being in force, unrepealed, or unmodified by any subsequent legislation, the governor had plainly the power to remove Dr. Morris, and to appoint Dr. Bartlett as his successor, during the recess of the senate. Dr. Morris, therefore, was erroneously advised to retain possession of the office, and to refuse the delivery to Dr. Bartlett of the books and papers appertaining to it.

The application made on behalf of Dr. Bartlett must be granted.

SUPREME COURT.

THE PEOPLE *ex rel.* MALLORY agt. BENJAMIN.

Where, on the trial of a cause before a justice of the peace, the attorney for the defendant was called upon as a witness for the plaintiff, upon a subpoena *duces tecum*, to produce a bill of sale between the parties; and he testified that he had the bill of sale then in his pocket, that he received it in his character of counsel for the defendant, after he was employed as such counsel in the action; that he considered himself under obligations not to disclose or produce it, unless by the consent of his client, and refused to do so, unless by his orders.

Held, that an order of the justice requiring the attorney to produce the bill of sale, and his subsequent conviction for contempt in not doing so, (2 R. S. 273, § 274,) were unauthorized and unlawful. Why? Because, the bill of sale was evidence entrusted to the attorney in the confidence growing out of the relation of counsel and client, and he was not at liberty to furnish the adverse party with it, or to testify to any fact which had come to his knowledge in consequence of that relation.

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If the order had been lawful, the neglect to comply with it by the attorney would not have been a *resistance*, so as to constitute a criminal contempt within the statute, (§ 274, *sub.* 3.) The resistance contemplated must be *to the execution* of the order—some physical positive hinderance or obstruction, not a neglect to execute it.

Yates Special Term, November, 1853. Common law certiorari to the defendant, upon a conviction by him as a justice of the peace of the relator for an alleged contempt.

S. V. R. MALLORY, *the relator in person.*

E. G. LAPHAM, *for the defendant.*

WELLES, Justice. In the following cases, and in no others, a justice of the peace may punish, as for a criminal contempt, persons guilty of the following acts:—

“1. Disorderly, contemptuous or insolent behavior toward such justice, while engaged in the trial of a cause, or in the rendering of any judgment, or in any judicial proceedings, which shall tend to interrupt such proceedings, or to impair the respect due to his authority.”

“2. Any breach of the peace, noise, or other disturbance, tending to interrupt the official proceedings of the justice.”

“3. Resistance wilfully offered by any person in the presence of a justice to the execution of any lawful order or process, made or issued by him.” (2 R. S. 273, § 274.)

“When a witness attending before a justice, in any cause, shall refuse to be sworn, in any form prescribed by law, or to answer any pertinent and proper question, and the party at whose instance he attended shall make oath that the testimony of such witness is so far material, that without it he cannot safely proceed in the trial of such cause, such justice may by warrant commit such witness to the jail of the county.” (*Id.* 274, § 279.)

The return to the certiorari shows that an action was depending before Benjamin, the defendant in the above title, who was a justice of the peace, in which Daniel Taylor was plaintiff and Alvin Ferguson was defendant, on the trial of which the relator

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was examined as a witness, touching the existence and whereabouts of a certain written agreement or bill of sale between the parties to the action; a subpoena having been duly served upon him, containing the *duces tecum* clause requiring him to produce the paper in question on said trial. It appeared by his testimony that he was Ferguson's counsel in said action and on said trial, and that after he became such, he received the bill of sale as such counsel from Ferguson, and that he then had it in his pocket: that he considered himself under obligations not to disclose it or produce it, unless by the consent of his client, and he refused to do so, unless by his orders: that at this stage of the trial the plaintiff moved an adjournment, and that the relator be committed to the jail of the county until he should be willing to testify, under the above recited § 279 and the two following sections, upon an affidavit of the plaintiff's counsel, showing that the paper in question was so material that without it the plaintiff could not safely proceed to trial. The motion was denied by the justice, who peremptorily ordered the relator to produce the paper to be read in evidence, which the relator refused to do. The trial then proceeded, at the close of which the plaintiff was non-suited. The return then proceeds as follows: "The witness Stephen V. R. Mallory, then being present, was called upon by me and inquired of by me what he had to offer in his defence for a contempt in resisting the order of the said court, requiring him to produce the said bill of sale to be read in evidence, and for not producing the same to be read in evidence on the trial of said cause, when required as a witness so to do; and the said Mallory was then and there informed that he then had an opportunity of being heard in his defense. Whereupon the said Mallory, stating that he was not bound to obey the order of the court, or produce the said contract to be read in evidence, because the same was delivered to him by his client, and neglecting to produce any testimony or evidence, or to offer any sufficient excuse for refusing to produce the said contract or bill of sale to be read in evidence, or for resisting the said order of the said justice, was convicted by me of a contempt of my court held as aforesaid for the trial

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of the said cause, and required to pay a fine of five dollars." The return then states that he the said justice drew up and filed in the county clerk's office of the county a record of the conviction, setting forth a copy in *hæc verba*, which assumes to state the particular circumstances of the offence, and among other things states that, when the relator was ordered and required by the justice to produce and exhibit the said contract or bill of sale, he peremptorily and contemptuously in the presence and hearing of the justice, and in the presence and hearing of the parties to the said action, and divers other citizens, refused to produce and exhibit to be read and used on the said trial the said contract or bill of sale.

The conviction was under one of the subdivisions of § 274 above recited. It was probably for an offence mentioned either under the first or third subdivision of that statute. If we look at the record of conviction alone, and lay out of view the return to the writ of certiorari, it would seem to have been under the first subdivision, for contemptuous behavior toward the justice, consisting in the manner of the relator's refusal to produce and exhibit the contract or bill of sale. If that was all, enough is not shown to authorize the justice to hold and treat him as in contempt. If it included, as a part of the offence, the fact of the refusal as well as the manner, whether that would strengthen the conviction, depends upon two other things; first, the legality of the order to produce it, and second, whether such refusal would constitute a resistance of the order, assuming it to be lawful, within the meaning of the third subdivision. I will consider first, whether it would be an offence under the first subdivision. Is the relator shown to have been guilty of contemptuous behavior, the tendency of which was *to interrupt the proceedings before the justice, or to impair the respect due to his authority*. The record does not state or show what the particular behavior of the relator was, excepting that he refused to produce and exhibit the bill of sale to be used in evidence; nor does it state what the tendency of such behavior was. This, I think, should appear; because unless the "behavior" complained of had the tendency mentioned in the

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first subdivision, the relator was not liable to be proceeded against under that subdivision, as for a criminal contempt. When the certiorari was served upon the justice, he had the opportunity, and I think it was incumbent upon him to have shown, if he could, by his return, what the particular behavior of the relator was which rendered it contemptuous, and gave it the character ascribed to it in the record of conviction; or, at least, to have stated that it had the tendency required by the statute to constitute a criminal contempt. This he has wholly omitted to do, and on the contrary has made a return presenting an aspect of the case, the strong inference from which is, that the only contempt complained of was the simple refusal of the relator to produce the paper in question, in pursuance of the order of the justice.

It only remains to consider whether such refusal was, or could be properly regarded, a criminal contempt.

1. The order must have been *lawful* to render its disobedience a criminal contempt. But this was clearly an unlawful order. The relator was placed upon the witnesses' stand by the plaintiff in the action before the justice, and testified that he received the bill of sale in his character of counsel for the defendant, after he was employed as such counsel in the same action. It was evidence entrusted to him in the confidence growing out of the relation of counsel and client, and he was not at liberty to furnish the adverse party with it, or to testify to any fact which had come to his knowledge in consequence of that relation. (Jackson agt. Dennison, 4 *Wend.* 558; Coventry agt. Tatnall, 1 *Hill*, 83; Kellogg agt. Kellogg, 6 *Barb. S. C. R.* 116; 2 *Cow. Treat.*, 3 ed., 440, 441.) Some of these authorities show that a counsel having the possession of a paper which is material evidence upon the trial, is bound to testify to the fact of its being in his possession, and the time and circumstances under which it came there; but he is not bound to produce it or disclose its contents, where he received it in his character of counsel or attorney.

2. If the order of the justice to produce the paper had been lawful, the neglect to comply with it by the relator would not

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have been a *resistance*, so as to constitute a criminal contempt within the third subdivision referred to. The resistance contemplated must be some positive affirmative act, some interference or physical hinderance or obstruction by the party accused to the execution of the order of the justice, and not a mere omission to obey it. It must be a resistance *to the execution* of the order, and not a neglect to execute it.

For the foregoing reasons, I am of the opinion that the conviction should be reversed.

SUPREME COURT.

HUBBELL & CURRAN agt. DANA, Receiver of the Utica Insurance Company.

It seems, that in an action against a receiver, application to the court should first be made for leave to prosecute. (*The vicies expressed in relation to restraining receivers in the case of Van Rensselaer agt. Emery, ante, p. 135, concurred in.*)

But where a general notice of appearance has been served by defendant's attorney, it is a waiver of the irregularity in commencing the suit without leave of the court.

E. J. RICHARDSON, *for plaintiffs.*

WHITE & DANA, *for defendant.*

BACON, Justice. The history of this case, and an extended narrative of the merits of the controversy, are very unnecessarily spread out in the affidavits on which this motion is resisted. There is but a single question involved, to wit, whether the plaintiffs had a right to commence the suit without first asking leave of the court, the defendant being a receiver and prosecuted as such. It was undoubtedly a rule of the old court of chancery of this state, that its officers (including receivers) should not be harassed by suits brought against them at law, involving title to any property held by them as receivers, or questioning the propriety of their acts in their official capacity. (7 Paige 515; 8

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id. 388.) I have some doubt whether this rule now obtains under our present system, where law and equity are merged and consolidated in one tribunal, although in the latest case I have seen (9 *How.* 135) it is intimated, although not directly decided, that the proper mode of restraining a receiver when in the discharge of his official trust, is by an application to the court for instructions; and this I am inclined to consider a proper and judicious rule to be observed. But the conclusive answer to this motion is, that before it was made the attorneys for the receiver had served a general notice of appearance in the suit on the plaintiffs' attorney. This, it has been repeatedly held, is a waiver of any irregularity in the commencement of the suit. It is an admission that the defendant has been regularly brought into court. (7 *Cow.* 366; 5 *How.* 233; 6 *How.* 439.) The application to the court by the plaintiffs for leave to prosecute would have been a mere form, and, if necessary, can be granted at any stage of the suit.

The motion to dismiss the complaint is denied; but as the defendant is a receiver, and the plaintiffs may not have been technically right in their practice, it is without costs.

SUPREME COURT.

WATSON & GALLUP agt. FULLER & WADSWORTH.

An *injunction* order can only go against a *party* to the action, (*See Code*, §§ 218, 219.)

The *original* injunction order must be shown to the party—service of a copy only, with a notice that it is a copy of the original, is not sufficient.

Livingston Circuit and Special Term, May, 1854. Motion for attachment against John Gallentine, Le Grand D. Jennings, and Hiram Barber, for violating an injunction order, made in this action by JOHNSON, Justice, restraining the defendants and all their counsellors, attorneys, solicitors and agents, and especially John Gallentine, a justice of the peace of Monroe county,

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and the sheriffs and constables of said county of Monroe, and all others acting in aid or assistance of them, and each and every of them, from disturbing the plaintiffs in the quiet possession and enjoyment of a certain farm in the town of Rush in said county, and from doing any act or thing in the law, or otherwise to remove the plaintiffs therefrom, and from prosecuting them for taking possession of said farm, and for holding possession thereof until, &c.

The motion is *ex parte*, no notice having been given thereof.

AMOS DANN, *for the motion.*

WELLES, Justice. The motion must be denied. The parties sought to be held in contempt are not parties to the action. This, in my judgment, is fatal. (1 *Maddock's Ch. Prac.* 175, 3d Lond. ed., p. 175, and cases there cited.)

Independent of the former practice of the court of chancery, I think it is plainly to be inferred from the Code that an injunction order can only go against a party to the action. (§§ 218, 219.)

Again, the papers upon which this motion is founded are insufficient. None of the parties against whom the plaintiffs ask to have the attachment issued have been served with the affidavit upon which it was allowed. (Penfield agt. White, 8 *How. Pr. R.* 87.)

With regard to Le Grand Jennings, there is this further difficulty, that the original injunction order was not shown to him. It only appears that a copy was served, with a notice that it was such copy. This is not sufficient. (Coddington agt. Webb, 4 *Sand. Sup. C. R.* 639.)

And with respect to Hiram Barber, there is the still further difficulty, that it is not shown that any sort of service of the injunction, either by showing the original or delivering a copy, has been made on him.

SUPREME COURT.

RAY, Trustee, &c., AND OTHERS agt. VAN HOOK.

Where the plaintiff lavishly charged the defendant with depredation, embezzlement, and fraudulent misapplication of trust funds, and claimed \$60,000 due the estate; and on the reference for accounting, it appeared that there was but about \$17,000 balance due from the defendant, which had been probably secured by a mortgage given by him, before the reference—*held*, that although it appeared that the defendant had at one time borrowed of the estate for his own benefit, with the consent of a co-trustee, the sum of \$12,000 in stocks, (which was included in the mortgage,) he was not liable for *all* the costs of the reference; and would not have been chargeable with any costs but for the breach of trust in taking the stocks.

The general principle in such cases is, that executors are entitled to their costs in settling their accounts so far as they are not in fault; and bound to pay costs as to such inquiries in the action as are caused by their breach of trust.

New-York Special Term, May, 1854. Motion for costs against the defendant, after a reference upon accounting by him as a trustee of an estate.

GEO. T. STRONG, *for plaintiffs.*

GEO. C. GODDARD, *for defendant.*

MITCHELL, Justice. In Pocock agt. Redington (3 *Ves.* 794, 800, 801) a bill was filed against an executor and trustee for an account, and charging him with breaches of trust as to real and personal estate. It appeared that there was no breach as to the real estate, but that part of the personal estate had been sold by the executor and invested in his own name in stocks bought with his own money and the proceeds of the sale. His account was correct, except as to this single breach of trust. The court held that if it had not been for that one breach he would have been entitled to his full costs: that the only doubt would be whether he should pay *any* part of the plaintiff's costs: that it would be injustice to make him pay the whole, as *one part of the bill had failed*: and that it would be sufficient to satisfy justice if he should pay that part of the costs relating to the breach only, considering his severe losses and the gain to the *cestui que trust*—for his investments had proved a loss.

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In Raphael agt. Borhon (18 Ves. 591, &c.) the court, in the case of a trustee defendant, who had committed breaches of trust in not accumulating funds in his possession, gave costs against the defendant as to that accumulating, but gave him his costs in *all other respects*.

In Sanderson agt. Walker, (18 id. 601,) trustees for infants had bought property at a sale made by them for the infants. They were held liable for the costs of investigating that matter, but entitled to all the other costs of the suit.

In Tibbs agt. Carpenter (1 Mad. 162, 171, *Am. ed.*) it is said, if a suit would have been proper, and the executor a necessary party, though the executor had not misconducted himself, he ought not to pay *all the costs* of such suit, *though in the course of such suit it appears he has misconducted himself*; but if the misconduct of the executor was the *sole* occasion of the suit, he ought then to pay the costs. The bill was for the construction of a will, and the executors were allowed their costs, except the costs as to arrears of rent and balances in their hands, as to which the inquiry was solely occasioned by their breach of trust.

The general principle to be adopted from these cases is the just one, that executors are entitled to their costs in settling their accounts, so far as they are not in fault, and bound to pay costs, as to such inquiries in the action as were caused by their breach of trust.

The complaint in this case charged the defendant with having acknowledged satisfaction of a mortgage for \$5,000, and not including it in his accounting with the estate: his answer stated that that mortgage did not belong to the estate; and such appears to have been the fact, as the amount reported due by the defendant is, exclusive of interest, under \$3,000 on the settlement of all his accounts. In this the plaintiffs were wrong.

The complaint charged that the defendant owed the estate first \$80,000, and then by amendment \$60,000. The report against him is, with interest, \$8,648, to that add \$1,247 paid by him pending the suit, and about \$12,000 for stocks sold by him and used for his own purposes, and the total is less than

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\$17,000. The claim of the plaintiffs was extravagant and its excess without foundation, and necessarily led to a defence of the suit and to the taking of an account. They were as much in fault in the extravagance of their claim as the defendant in not knowing and admitting the precise amount due. In addition to this, before this action was brought, the defendant was called upon by George T. Strong, Esq., the counsel for Mary Rebecca Ray, the executrix, in relation to his accounts, and stated his use of those stocks, and gave a bond and mortgage to Mrs. Ray, as executrix, for the return of the stocks and the payment of any balance due by him to the estate. None of the plaintiffs have ever disaffirmed the act of the executrix in taking this security, but have probably relied on it as one of their securities. This may not, perhaps, bar them from their original cause of action; but on a question of costs, it must be taken into consideration. The defendant had thus done what was equivalent to a confession of judgment (except as to the amount of the claim) before suit brought, and this confession was accepted by the executrix of the estate, who seems to have acted for all interested. It has secured the object intended, the return of the stocks, and probably secures also the payment of the balance due. The defendant, then, should not be charged with the costs of the accounting; and except for public policy, not for any costs in the suit. He did, however, as he admits, borrow the stocks of the estate, intending shortly to return them; and although he did this with the concurrence of his co-trustee, it was a breach of trust, and one which the court always condemns and visits with the punishment of costs. This policy of the court will be satisfied by requiring the defendant to pay the costs in the cause, except the costs of the referee and plaintiffs' costs, on the reference, and leaving the plaintiffs to pay their own costs on the reference and the costs of the referee.

The burden thus thrown on the plaintiffs is the more proper, as they unnecessarily and lavishly indulged in charges of depredation, embezzlement, and fraudulent misapplication, which seem to have had no foundation beyond their fears.

Philips agt. Prescott.

SUPREME COURT.

PHILIPS agt. PRESCOTT.

Where an action was commenced by the service of a summons only, no copy of the complaint accompanying it, but the summons stating where the complaint would be filed, and the defendant, instead of appearing and demanding a copy of the complaint, served a *stare* answer upon the plaintiff's attorneys denying each and every allegation of the complaint before the complaint was, in fact, drawn—*Held*, that the answer was irregular, and a fraud upon the rules and practice of the court.

The plaintiff, having returned the answer, specifying as a reason another alleged irregularity which did not exist, was nevertheless held not to have waived the true ground—the real defect being one which, if pointed out, it was too late for the defendant to answer, his time for answering having expired immediately after the irregular answer was returned.

The *proof* that no answer has been received, which the clerk must have, in order to authorize the entry of judgment by default under the Code, need not rest solely in *affidavit*.

Accordingly, where it appeared by affidavit that an answer in form, served on the 26th, the last day for answering, was immediately returned—but the only proof that a complaint in the action had not then been drawn was, (1.) The summons and proof of service, showing that it was served without complaint; and (2.) The complaint itself, produced and verified before the clerk and filed on the 27th, as appeared by the jurat and endorsement of filing *after* the answer was served and returned.

Held, that the answer was not an answer to the complaint, that the proof that no answer had been received was sufficient, and that the judgment entered on such proof was regular.

Wayne Special Term, July, 1854. Motion by the defendant to set aside the judgment and subsequent proceedings in the action for irregularity, &c.—The facts are stated in the opinion of the court.

WILLIAM CLARK, *counsel for defendant*, insisted in support of the motion, that in order to authorize the clerk to enter judgment on failure to answer, there must be proof before the clerk that no answer has been received: that in this case there was not only an entire absence of such proof, but, on the contrary, there was positive proof that an answer had been received: that the question is not whether the answer is a regular one—of that, the clerk is not to judge—but whether any

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answer has been received. If the defendant has appeared in the action and set up his defence, and asked to be heard by the court, it is not for the clerk to decide that he has not come in the regular way, and so to shut him out from his defence by entering judgment against him, merely because the plaintiff's attorneys have thought proper to return him his answer.

F. E. CORNWELL, *for the plaintiff*, made the following points in opposition to the motion:—*First*, It appears from the affidavits that in point of fact the answer served was not an answer *to the complaint*, and therefore that no answer to the complaint had been received. Was there *proof* of this fact before the clerk? If there was, the judgment was regular. We say there was: that,

1. This proof need not be by *affidavit*. (*Code, sec. 246, sub. 1; Bouvier's Law Dic. PROOF.*)

2. The fact was apparent to the clerk from an inspection of the papers. It appeared that the action was commenced by the service of *summons only*. The complaint, in accordance with the regular and ordinary practice, was produced and sworn to before the clerk and filed on the 27th, and this was evidence to the clerk that when the answer was served on the 26th, the *complaint* was not in existence, and so no answer to it had been received.

3. The clerk is properly the judge of questions of this kind, on the application for judgment under section 246. The statute makes it incumbent on him to decide whether or not an answer has been received—and he must, of necessity, in doing this, pass upon all the evidence before him. If a writing, denying the existence of the *Koran*, or stating any other absurd or irrelevant matter, but sworn to, entitled in the action, and called an answer, had been served, and returned, the clerk would of course be justified in holding, on such a state of facts, that no answer had been received.

4. The only question to be decided, if application had been made to the court instead of the clerk, for judgment, would have been not whether the answer served was sufficient, for in itself it is; but whether the *complaint* had been answered at

all. And this question the clerk is in view of the statute fully competent to decide, and it is his duty to decide it.

5. If it be said that notwithstanding the complaint was verified on the 27th, still it may have been before that drawn and served—we say that is only *presumption*—the date of the verification is the only evidence there is of the date of the complaint; and in the absence of any contradictory evidence, must govern. No presumptions can be indulged for the purpose of overturning the judgment of the court. The party taking judgment by default always takes it at his peril; and if irregularities do, in fact, exist, the party complaining of them must show affirmatively that they exist, and not depend upon presumptions.

T. R. STRONG, Justice. The grounds of irregularity specified in the notice of motion are the following: 1. That no proof was filed that an answer had not been received. 2. That an answer was served within the time allowed by law for answering.

It appears by the papers on the motion that the summons in the action was served on the 5th of June: that on the 26th of June an answer denying each and every allegation in the complaint, signed by the defendant in person, and verified by him on that day, was served on the plaintiff's attorneys: that the answer was on the same day returned by the plaintiff's attorneys with an endorsement thereon, that it was served "too late by one day:" that the complaint, which is upon a promissory note, was drawn and sworn to before the clerk on the 27th of June: and that on the same day an affidavit was made by one of the plaintiff's attorneys, before the clerk, that no answer or demurrer had been received, except that on the 26th day of June, 1854, and more than twenty days after service of summons, a copy of answer was left at the office of Smith & Cornwell, and was on the same day returned by mail directed to defendant at Newark, in said county, with an endorsement on it, "Served 26th June, 1854, too late by one day;" upon the filing of which affidavit with the summons, proof of service, and complaint, judgment was entered against the defendant, and execution was issued thereon.

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The attorneys for the plaintiff were mistaken in supposing that the time to answer had expired when the answer was served; the 25th of June, being the last of the twenty days after service of the summons, was Sunday, and the defendant was entitled to the whole of the 26th for answering. But the answer was nevertheless irregular, for the reason that the complaint had not then been prepared, and the plaintiff's attorneys had a right to return it upon that ground. They should, upon returning it, have specified that ground of irregularity, instead of the one stated by them; but I think it should not be held to have been waived by their omitting to do so, and stating an insufficient reason. The defendant has not been misled: if the true ground of irregularity had been given, it was too late to correct it, and it appears that the attention of the agent of the defendant was called to the true ground before the papers were prepared for this motion. Besides, the defendant was guilty of great impropriety, speaking in the mildest form, in making and verifying his answer without any knowledge of the complaint: such an answer is a fraud upon the rules and practice of the court, and ought not to be permitted to stand without clear evidence of an assent by the plaintiff's attorneys to overlook the irregularity, and such evidence is wanting.

It is undoubtedly essential to the regularity of the judgment, not only that the plaintiff should have been entitled to it when it was entered, but that the proper proof that no answer had been served which he was bound to regard, or which he had retained, should have been furnished to the clerk. The affidavit filed with the clerk showed that an answer had been received in time, which was returned as too late; but it also appeared to the clerk, that the complaint upon which he was asked to enter judgment, was not verified or filed until the 27th, after the time for answering had expired, which was sufficient evidence that it had not been completed or served before that time. It could not properly be verified after service. He had before him, therefore, full proof that the answer served was irregular, and that it had been returned, and I think was not bound by any thing in the papers to regard the irregularity as

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waived. In my opinion, the proof presented to the clerk was sufficient to warrant the judgment.

The defendant, if he desired to answer, should within the time allowed for the purpose have demanded a copy of the complaint, and upon receiving the same, put in an answer thereto.

The motion must be denied, with seven dollars costs.

SUPREME COURT.

LANNING agt. PETER SWARTS & DANIEL SWARTS, Administrators, &c.

An *offer* to refer an account presented to administrators for payment (2 R. S. 88, § 36) need not be in writing; it is good by parol.

Where in an action against administrators, the plaintiff's bill of particulars differs from the account previously presented to them for payment, in the charge of *interest* only, it is a variance which can not be regarded, because, interest is no part of the account, it is a mere incident or legal result.

At Chambers, Penn Yan, April, 1854. This action was brought to recover the balance of an account claimed by the plaintiff to be due to him from the defendants' intestate in his lifetime, amounting to \$20.75. The account consisted of over twenty items bearing dates ranging from June 27, 1831, to November 21, 1845, inclusive.

At the proper time, the plaintiff presented the account for payment to the administrators, accompanied by the affidavit required by the statute, (2 R. S. 88, § 85,) and payment was refused on the ground there was nothing due. The plaintiff then offered to refer the matter, pursuant to section 86 of the same statute, but the defendants refused to refer; whereupon the plaintiff brought this action. The offer to refer was not in writing, but was merely verbal. In the account presented before the action was brought, the last item was under date of November 21st, 1845, and amounted to 18 cents. Then followed a charge of "interest on \$15.50 of the above amount for five years," carried out at \$5.25. After the action was brought,

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the defendants demanded a bill of particulars, which was rendered, and was in all respects like the one presented before the action was commenced, except that the said item of interest was put down at \$8.50 instead of \$5.25. The action was defended, and the plaintiff recovered judgment for the item of 18 cents before mentioned, and no more.

The plaintiff's counsel now moves for costs to be included in the judgment against the defendants.

J. S. SEELY, for the plaintiff.

J. TAYLOR, for the defendants, contended that the plaintiff was not entitled to costs, for the reasons:

1. That the offer to refer was by parol. It should have been in writing.

2. The bill of particulars of the demand sought to be recovered is not the same demanded before action brought. It is larger—and cited 1 *Denio*, 674, and 6 *Hill*, 386.

WELLES, Justice. The plaintiff is entitled to recover judgment for costs against the defendants, to be collected from the estate of the intestate. (2 *R. S.* 90, § 41; *Bullock agt. Bogardus*, 1 *Denio*, 276, and note a, at the end of the case; *Hartshorn agt. King*, *id.* 674; *Code*, § 304, subd. 3, and § 317.)

As to the objections of the defendants' counsel: 1. The law does not require the offer to refer to be in writing. The practice has been both ways, and I have never before heard it objected that an offer by parol was not good. 2. The account presented to the administrators was substantially like the one contained in the bill of particulars. The only variance is in the charge for interest, which can not be regarded, in respect of the present question, as a part of the account. In the account presented, the charge for interest is put down at \$5.25, and in the bill of particulars, interest on the same account is charged at \$8.50. If the plaintiff was entitled to interest at all, it was a mere incident or legal result. The case is plainly distinguishable in this respect from those cited by defendants' counsel.

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SUPREME COURT.

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Where the charter of an incorporated company by its provisions makes a stockholder, under certain circumstances, personally liable for its debts, a *judgment* previously recovered against the corporation is *prima facie* evidence of a debt against the stockholder individually. (*The doctrine contained in Slee agt. Bloom*, 20 John. 669, and *Moss agt. McCullough*, 7 Barb. 279, concurred in.)

It is therefore sufficient to aver in a complaint in an action against the stockholder personally, the recovery of a judgment against the corporation, and the other facts on which the liability of the defendant under the statute attached, without alleging the consideration and circumstances of the *original indebtedness*.

Where several stockholders in an incorporated company in good faith subscribe and pay over in money their subscriptions for the purpose of increasing the stock of the company, and the company fail in carrying out that purpose; an obligation on the part of the company implied by law to refund such subscriptions is thus created; and is a claim by such stockholders, arising *ex contractu*, and therefore assignable and capable of enforcement by the assignee in his own name.

Where several causes of action of the same nature are properly united in the same complaint, but are *not separately stated*, the defect can not be reached by *demurrer*. (*The cases holding the contrary view, not concurred in.*)

D. WRIGHT, *for defendant*.P. GRIDLEY, *for plaintiff*.

BACON, Justice. In the view which I take of this case, it will not be necessary to follow the line of the ingenious argument of the counsel of the defendant, or to consider his objections to the complaint in the order of the demurrer. The gravamen of the complaint, as I understand it, is this: On the 9th of June, 1853, the plaintiff recovered in the supreme court a judgment against the Utica Iron Manufacturing Company for the sum of \$5,581.54, which included, doubtless, the costs of entering and docketing the same, founded on an indebtedness alleged to exist against them in favor of the plaintiff. At the time of the accruing of the indebtedness, on which was predicated the recovery of this judgment, and up to the time of the

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commencement of the present suit, the defendant was a trustee of the said iron manufacturing company. He was such trustee, indeed, from the organization of the company in November, 1849, to the time above mentioned.

By the 12th section of the act of February, 1848, authorizing the formation of corporations for manufacturing, mining and other purposes, under which the company above named was organized, it is made the duty of every such company within twenty days from the 1st of January in every year, to make and publish a report stating the amount of their capital, &c., and to file the same in the office of the clerk of the county in which the business of the company shall be carried on. It then provides that if any company shall omit to make such report, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made. The complaint avers that the defendant omitted to make the report thus required, and that no such report was ever made, published or filed by the trustees, as required by the act, from the organization of the company to the present time: that in consequence of this omission the defendant became individually liable for all the debts of the company as trustee, and the plaintiff claims judgment for \$5,572.38, being the judgment aforesaid, deducting, as I understand, the costs of its recovery.

No report having been made up to the time of the commencement of this suit, the defendant, by the operation of this section of the act of 1848, was liable for all debts contracted by the company until a report should be thereafter made. And when the suit was commenced, the plaintiff held a judgment recovered in his own name against the company. Was the existence of this judgment, then, sufficient evidence of a debt contracted and existing against the company, so as to charge the defendant under the statute? It is not to be denied that there is a conflict of the authorities upon the point of how far a judgment is evidence of an indebtedness by the company in an action against a stockholder. I shall not attempt to reconcile them, but content myself with saying, that in my

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judgment the doctrine first announced in the leading case of *Slee* agt. Bloom, (20 *John*. 669,) and reaffirmed in the more recent case of *Moss* agt. McCullough, (7 *Barbour*, 279,) has both weight of authority and principle to support it. The point decided in those cases is, that in an action against a stockholder, grounded on a special provision, rendering him liable in certain contingencies for debts contracted by the company of which he is a member, a judgment previously recovered against the corporation is *prima facie* evidence of a debt against the defendant, subject only to be impeached for collusion or mistake.

The case in 5 *Hill*, 131, in which COWEN, J., undertook to overthrow this principle, proceeded mainly upon the ground that a stockholder standing in this position was substantially a guarantor of a debt, contracted by the corporation, and was entitled to all the indulgence extended to parties occupying that relation; a doctrine the fallacy of which is conclusively shown by WILLARD, J., in the case above cited from *Barbour*, and entirely exploded by the judgment of the court in that case. If the principle thus finally established in the case in 7 *Barbour*, 279, is the true rule of law applicable to this case, then it was sufficient for the plaintiff to aver the recovery of the judgment against the company, and the other facts on which the liability of the defendant under the statute attached, to make good complaint, and all beyond this might be struck out as mere surplusage, and leave a perfect pleading.

But the plaintiff has proceeded further than this, and either because he supposed it might be necessary, or *ex majori cautela*, has gone back to the origin of the indebtedness, and averred when, and how, and upon what consideration it was created. The allegations on that subject are briefly that in March, 1851, the plaintiff, for the purpose of aiding to increase the capital stock, \$25,000, subscribed the sum of \$500, Dolphus Skinner \$4,000, and Mary J. Munn \$500, for the same object, payable in instalments, the last of which was due in April, 1852: that the said parties paid in their subscriptions on the same, and afterward Skinner and Mrs. Munn assigned their claims arising out of this payment of their subscriptions to the plaintiff, all

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which subscriptions it is averred were made and paid in the confidence that proper and legal steps had been taken to increase the stock of the said company; but, as the plaintiff avers, no legal proceedings to increase the stock were ever taken, and no certificate was made as required by law, and the complaint charges that the amounts paid on said subscription have been received and used by said company, and entirely absorbed in the payment of the debts of said company. This, then, is the demand which subsequently passed into the judgment set forth in the complaint, and this the mode of its creation and the shape of the indebtedness when the defendant made the default under which it is claimed his liability attaches. The substance of the transaction is, that money was paid into this company upon a consideration that has failed, thus creating an obligation implied by law to refund the same, a claim arising *ex contractu*, and therefore assignable and capable of enforcement by the assignee in his own name.

From this statement of the case as exhibited in the pleadings, it results, I think, that most of the grounds of objection urged against the complaint in the demurrer interposed by the defendant, and the argument by which the demurrer was sought to be sustained, are easily disposed of. Thus the objection grounded on an alleged defect of parties is entirely untenable. It proceeds upon the assumption that the claims in this case, existing originally in behalf of Skinner and Mrs. Muan, could not be assigned to plaintiff, they being demands not arising out of contract, and therefore within the restriction of § 111 of the Code. But unless I have wholly mistaken the nature of the transaction as it is described in the complaint, nothing can be clearer than that the transaction was one sounding in contract and not in tort, and the relief sought and demanded by the complaint was the specific sum for which the original judgment was recovered. If the plaintiff's attorney, through inadvertence or otherwise, issued his summons under the 2d subdivision of the 129th section of the Code, that may have furnished a good reason for setting aside the complaint on motion as not conforming to the process, but has nothing to do with

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the questions arising upon the pleadings in this stage of the cause.

Under the fourth alleged ground of the demurrer it is insisted the complaint is defective in not averring that either of the subscriptions were paid in *money*, and it is claimed that inasmuch as the statute requires that payment for stock shall be in money only, that the pleading should allege the fact of payment in the precise words of the statute, thus excluding the possible conclusion that it was made in anything else. I do not conceive that this great nicety is necessary. The fact is alleged that the parties subscribed so many dollars to the increased stock, that the subscriptions *were paid*, and that the amounts paid were received by the company, and used and absorbed in the payment of their debts. This I regard as in substance an allegation of a payment in money sufficiently specific to meet the requirements of the Code in respect to pleadings.

The only ground of demurrer in respect to which I have had any serious difficulty is the second, which is, that several causes of action have been united without being separately stated. It is insisted that the claim of plaintiff, under his subscription and that arising out of the demand assigned by Skinner and Mrs. Munn to the plaintiff, each constitute a separate and distinct cause of action, which, by § 167 of the Code, were required to be separately stated. It is quite clear that these are causes of action of the same nature which can all be united in the same complaint; and the only question then is, whether they should not have been separately stated, and if so, whether a demurrer will reach this defect. I am by no means sure that it may not be a sufficient answer to say, that the statements in the complaint setting forth these several claims are only by way of inducement to and explanatory of the composition of the judgment in which they were all ultimately merged, and which itself constitutes the real and substantive claim in this suit. But without insisting upon this as a conclusive answer, I am upon the whole disposed to hold that if a defect in the pleading, it is not one that can be reached by a demurrer. I am aware that there is very respectable authority

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the other way ; but when I look carefully at the 144th section of the Code, I am unable to perceive which of the six subdivisions can with any propriety be applied to the case. The fifth subdivision inhibits the improper union of several causes of action, but assuredly the causes of action in this complaint are among those which can be united with entire propriety, since they all arise out of contract and spring from the same transaction. The only objection is, that they are not separately stated ; but this is the merest matter of form. It stands, or should stand, it seems to me, in the same category with an omission to number several defences where more than one is interposed, or to add a signature where it is necessary, or an omission in respect to other matters required by the Code, or the rules, to give symmetry and perfection to pleadings in their formal and technical aspect, but by no means essential to their completeness as to matters of substance. It is substance and not form that is to be reached by a demurrer. All else is subject to correction by the appropriate remedy of a motion, for which both the Code and the rules have made ample provision. It is not without hesitation that I dissent from the opinions of Justices WILLARD and HARRIS, who have held the defect here complained of to be capable of being reached and remedied by a demurrer. (4 *How.* 226 ; 8 *id.* 177 ; 9 *id.* 342.) There is, however, respectable authority on the other side, and the good sense of the thing seems to me clearly to sustain the conclusion to which I feel constrained to come.

There are no other points presented by the demurrer that I deem it necessary to notice, beyond the brief consideration I have given them in the course of this discussion, and the result is, that there must be judgment for the plaintiff on the demurrer, with leave to the defendant to answer upon payment of costs.

Blodget agt. Conklin and Arnold.

SUPREME COURT.

BLODGET agt. CONKLIN AND ARNOLD.

Where process has been served on both defendants, joint debtors, an attorney employed by one of them is not authorized to appear for both and allow judgment to be taken by an offer under § 385 against both defendants.

Where, however, a defendant has been regularly brought into court by process, and an attorney of the court appears for him, his acts are valid and binding upon the party until he is superseded, unless collusion is shown, and the remedy of the party is against the attorney for appearing and acting in his name without authority.

Where it appears that the attorney is irresponsible, the court, in order to protect the defendant, in case he swears to merits, will let him in to defend, allowing the judgment to stand as security.

Ontario Special Term and Circuit, February, 1854. Motion to set aside judgment, &c.

The action was commenced by summons, which was personally served on both defendants. The service was made upon the defendant Conklin on the 25th of January, 1854. On the next day after the service of the summons on Conklin, he employed H. O. Chesebro, Esq., an attorney of this court, to defend the action.

On the first day of February following, Mr. Chesebro caused a notice of appearance for the defendant Conklin, with a demand of a copy of the complaint to be served upon the plaintiff's attorney, who, on the same day, returned the notice and demand to Mr. Chesebro, with a message that it would not be received, and that an attorney had already appeared in the action for the defendants, and that judgment had been entered therein in favor of the plaintiff. Upon examination of the clerk's office of Ontario county, it was found that judgment had been entered in said action in favor of the plaintiff against both defendants for \$824.29, on the 30th day of January aforesaid.

The defendant Conklin swears that he never employed or authorized the employment of any attorney to appear for him, or for the defendants in said action, or to defend the same, except the said Chesebro, or to do any other act or thing for him or the said defendants as their attorney in said action.

Blodget agt. Conklin and Arnold.

On the part of the plaintiff it appears, that soon after the action was commenced, and after the service of the summons, the defendant Arnold employed D. A. Robinson, Esq., an attorney of this court, to appear in said action for both defendants, and to demand a copy of the complaint, which was done by said Robinson on the 28th of January aforesaid, three days after the commencement of the action. That on the 30th of the same month a copy of the complaint was served on Mr. Robinson in pursuance of such demand. That afterward, and on the same day, and after consultation between Arnold and Robinson, the former directed the latter to serve upon the plaintiff's attorney an offer in writing to allow judgment to be taken against the defendants in said action for the amount for which the same was afterward entered, less the amount of the plaintiff's costs as adjusted, which offer was accordingly made and accepted, and judgment perfected thereon, in pursuance of § 385 of the Code. It also appeared that the defendants were, during all the times above mentioned, and for some time previously, partners in the mercantile business, and that the action was brought against them for a demand owing by them as such partners. Other matters are stated in the affidavits, which, as far as regarded material, will be adverted to in the opinion.

A. WORDEN AND H. O. CHESBRO, *for defendant.*

E. G. LAPHAM, *for plaintiff.*

WELLES, Justice. The plaintiff appears to have been perfectly regular in obtaining the judgment. No collusion is shown between the attorney first employed, Mr. Robinson, upon whose offer the judgment was entered, and the plaintiff. Conklin and Robinson both show, in their affidavits, that the latter supposed Arnold was authorized to employ him for both defendants. Nor is there anything to show collusion between the plaintiff and the defendant Arnold. Enough appears to show hostility between the two defendants, and that Arnold desired, and that his measures were taken with a view to give the plaintiff a preference over the other, or some other creditors of the firm, and to prevent Conklin from putting in a de-

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fence. But I cannot discover sufficient evidence in the papers to establish the plaintiff's connection with such intention, or to bring home to him notice thereof. I do not discover that the plaintiff occupies any other position than that of a vigilant creditor, seeking the collection of his debt according to the forms of law.

The fact that Conklin had not given Robinson authority to appear for him did not render the judgment irregular. The summons had been served personally on both the defendants, and no collusion on the part of the plaintiff with any one is established. Mr. Robinson is an attorney and counsellor of this court, and as attorney for both the defendants served notice of retainer, and afterward the offer that the plaintiff take judgment. The plaintiff had no right to disregard these papers so served by Robinson. If collusion between the plaintiff or his attorney, and Arnold or the attorney whom he employed, had been satisfactorily established, the case would have been entirely different, and the judgment would, in that case, be set aside as against Conklin. (Denton and others agt. Noyes, 6 *Johns. R.* 296; Sterne agt. Bentley and McLaughlin, 3 *How. Pr. R.* 331.)

But as between Conklin and Mr. Robinson, there was no authority for the latter to appear and take any step which would result in a judgment. It has long been settled that one partner cannot confess judgment to be entered against his co-partner. (Crane and others agt. French and Wilkin, and another case, 1 *Wend. R.* 311, and cases there cited.)

Where, however, the defendant is regularly brought into court by process, and an attorney of the court appears for him, his acts are valid and binding upon the party until he is superseded, unless collusion is shown; and the remedy of the party is against the attorney, for appearing and acting in his name without authority.

Where it appears that the attorney is irresponsible, the court, in order to protect the defendant, in case he swears to merits, will let him in to defend, allowing the judgment to stand as security. In this case Conklin has sworn to merits; and

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although there is no allegation of any want of responsibility on the part of Mr. Robinson, yet as it is conceded that he has acted in good faith, and as there appears to be no disposition to involve him in any pecuniary responsibility, I am disposed to order that the defendant Conklin be let in to answer the complaint and defend the action, the judgment and levy in the mean time to stand as security. All further proceedings thereon on the part of the plaintiff to be stayed until the further order of the court, on payment of seven dollars costs of opposing this motion.

SUPREME COURT.

BAXTER & FULLER agt. ARNOLD, CONKLIN & BAILEY.

Where the notice in the summons contained a demand for money against two of the defendants only, and a demand for relief against all of the defendants, (there being three,) *held*, that the notice was *irregular*. Section 129 of the Code contemplates only one notice, or a notice under one of its subdivisions.

Where, however, the *complaint* contains the appropriate prayer for relief, upon the allegations of fact constituting the cause of action, and is served with the summons, the defendants can not be misled.

A notice of motion signed by the attorney for the defendant, generally, without stating that it is for the purpose of the *motion only*, is an *appearance*, generally, in the cause which waives an irregularity in the summons.

Ontario Circuit and Special Term, February, 1854. Separate motions by defendants Arnold and Bailey, (who appear by different attorneys,) to set aside the summons and the service thereof, and all other papers served in the action, for irregularity. The complaint was served with the summons, together with a copy of an injunction and affidavits, upon which the injunction was granted. The summons contained the title of the cause, the name of the court and county, and required the defendants to appear and answer the complaint of the plaintiffs, a copy of which was stated to be therewith served on the defendants within twenty days, &c., and concluded as follows:

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“And if you fail to answer said complaint as hereby required, the plaintiffs will take judgment against Chester O. Arnold and John S. Conklin for nine hundred dollars and sixty-two cents, with interest thereon from the 27th day of January, 1854, besides costs, and against all the defendants for the relief demanded in the complaint.”

The complaint sets forth, in the first place, that the defendants Arnold and Conklin are partners and merchants under the name of Arnold & Company, and that they were indebted to the plaintiffs in the sum mentioned in the summons for goods sold and delivered, &c., which the defendants have not paid; and the plaintiffs, therefore, demand judgment against said defendants, Arnold and Conklin, for the said sum of \$900.62. The complaint then contains statements and allegations showing that the defendants, Arnold and Bailey, have entered into an arrangement, by which Arnold, claiming to have the power to do so, has made a fraudulent sale of a large portion of the goods of the firm of Arnold & Conklin, which the latter claims to be the owner of, and threatens to take possession of: that all the defendants are insolvent, and that said pretended sale was made with the intent, on the part of the said Arnold and Bailey, to defraud the creditors of the said firm of Arnold & Co. The complaint then prays that the defendants may be enjoined from selling or disposing of the said goods, or any of the goods of said firm; and that Bailey may be enjoined from selling, disposing of, or intermeddling with or attempting to get possession of said goods, or any part thereof, claimed or pretended to have been sold to him by said Arnold, and that a receiver be appointed, &c.; and that the judgment that may be obtained thereon be satisfied from such property or the proceeds thereof.

The notices of the motions contain six specifications of irregularity, as follows:—

1. The summons contains a notice that the plaintiffs will take judgment for a sum specified therein in an action arising on contract, and joins therewith a notice also, that the plaintiffs will apply to the court for the relief demanded in the complaint in violation of section 128 of the Code.

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2. The demand for money is against two of the defendants only, while the demand for relief is against all the defendants.

3. The summons does not contain a notice as required by the Code.

4. It contains two notices which are repugnant to each other, and which cannot be joined in the same summons.

5. It is not directed as required by law.

6. It is not dated, nor is it in the manner and form required by law.

The notices are signed, in the one case, "Mallory & Robinson, Attorneys for defendant Arnold;" and in the other, "E. G. Lapham, Attorney for defendant, J. B. Bailey."

The motions were argued by

D. A. ROBINSON, *for defendant Arnold.*

E. G. LAPHAM, *for defendant Bailey.*

A. WORDEN & H. O. CHESEBRO, *for plaintiffs.*

WELLES, Justice. I think the plaintiffs were strictly irregular in the form of the notice contained in the summons. It should have been simply that the plaintiffs would apply to the court for the relief demanded in the complaint. The 129th section of the Code evidently contemplates but one notice, or a notice under one of the subdivisions of the section, and not both. Perhaps the notice that the plaintiffs would take judgment in default of an answer for the sum mentioned might be regarded as surplusage. The defendants, however, in this case cannot be misled, as a copy of the complaint was annexed to the summons, by which they were fully apprised of what they were called upon to answer. If there was an improper joinder of parties or causes of action, or if the prayer for judgment was not adapted to the case made by the complaint, the defendants' remedy was by demurrer or motion to strike out portions of the complaint. The defendants cannot suffer, therefore, by the variance complained of, and unless compelled by some inflexible rule of practice or provision of the statute to set aside the plaintiffs' proceedings, I shall feel disposed to deny the motions.

It has been repeatedly held that an appearance in the action

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by the defendant was a waiver of the irregularity in the summons. (Dix agt. Palmer, 5 *How. Pr. R.* 233; Webb agt. Mott, 6 *id.* 489; Hewett agt. Howell, 8 *id.* 346.) In this case the moving defendants have both appeared. I know it was contended on the argument that here was no appearance. There had been no separate notice of retainer, it is true, but in giving notice of these motions the attorneys have signed their names generally as attorneys for their clients respectively. This, in my judgment, amounts to an appearance for all purposes. If it was not so intended, but the appearance was for a specific purpose; for example, the making of these motions, the limitation should have been stated in the notice. It was held by this court under its former organization, that a notice of bail necessarily imported a notice of retainer. (Teunis agt. Quick, 3d *Caine's Rep.* 138.) I have no hesitation, therefore, in denying the motions. This view covers and disposes of all the grounds of irregularity stated in the notice of motion, which are all that can be considered by the court.

The motions are denied, without costs.

SUPREME COURT.

BAIN & BRINCKERHOFF agt. THE GLOBE INSURANCE COMPANY.

An *agent* of an insurance company, properly appointed and qualified to procure and effect insurance for the company, residing at a different place from where the principal office of the company is located, is such a "managing agent" that legal service of a summons and complaint against the company may be made by serving on him.

New-York Special Term, June, 1854. Motion by defendants to set aside judgment and execution, on the ground that neither the summons nor complaint had been served upon them. It appears that the summons and complaint in this action were served on one George T. Bradley, of the city of New-York, an agent of the defendants: but whom the defendants asserted

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was not, and never had been the president, secretary, cashier, treasurer, or other head of the company, but was a subordinate agent or clerk of said company, and never had the management or control of its affairs, or any branch of its business. The plaintiffs showed that said Bradley had a written contract and power of attorney signed by the president and secretary of said company, who were located at Utica—by which he was appointed the agent of the company at the city of New-York, and fully authorized on their behalf to effect insurances for the company, &c.

CHARLES TRACY, *for motion, cited Code, § 134; 5 Pr. Rep. 183; 6 id. 308.*

LUCIEN BIRDSEYE, *opposed.*

ROOSEVELT, Justice. The Code does not require that the service of a summons should be made exclusively “on the president or other *head* of a corporation.” It allows (even where there is such a “head”) a delivery “to the secretary, cashier, or treasurer;” and the privilege has recently been extended to “a director or managing agent;” in other words, to any agent to whom the term “managing” can properly apply. Mr. Bradley, who in this case received the summons, it is conceded, was an agent of the company; and the only question is, was he a managing agent. His office was to procure business for the company in the city of New-York. He had full power to receive premiums and to issue policies binding on the company; and for that purpose was supplied, it appears, with an indefinite number of those instruments executed in blank. His functions were utterly unlike those of a mere clerk or porter, or baggage-master. Nor were they confined to a single insurance or any other single act. He had the entire management of the business of the company in the city of New-York, and could subject them to liabilities limited only by the extent of their capital. It seems to me quite clear, that, if such an officer be not a “managing” agent of the company, no other officer except the president can be, and that the term must be confined to a person occupying the position of “*head* of the

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corporation.” This palpably was not the intention of the law. The legislature, seeing that it was the practice of these corporations, while nominally located in one place, really, under the name of agency, to transact their chief business in another, (selecting particularly, for that purpose, the city of New-York,) very justly, as I conceive, treated the officers placed in charge of such agencies as occupying the position of quasi “heads,” not merely to allure custom, but to “stand suit.” If competent to the one office, they should be deemed equally competent to the other.

The summons in the present instance, it is admitted, came to the hands of the company; and as no defence on the merits is pretended, and as the service was legally regular, the motion to vacate the judgment for want of jurisdiction must be denied.

SUPREME COURT.

DAVIS agt. ILLIUS.

Facts upon which a question of law was decided.

New-York Special Term, June, 1854.—Motion on the part of the defendant to dissolve a temporary injunction.

The plaintiff obtained a temporary injunction to prevent the defendant from selling certain stock, on the ground that it was given to the defendant as part of an usurious transaction. The plaintiff swears that he borrowed of the defendant \$5,000 in December, 1853, for four months, at seven per cent. interest, and that it was agreed at the time that he should also give to the defendant one hundred shares of stock of the par value of \$100, but then selling in New-York at \$5 per share.

The plaintiff further shows, by the clerk of the company, that one hundred shares of the stock were transferred to the name of the defendant on the day of the loan; and furnishes an affidavit of a gentleman of Boston, who was present at a con-

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versation in February, 1854, between these parties and a Mr. Martin; and he says, that at that conversation it was explicitly stated that Davis had given Illius and Martin each a bonus of one hundred shares for a loan of \$5,000.

Martin swears that the plaintiff applied to him, not to lend him money, but to procure for him \$5,000 cash, and an extension on a note of \$5,000 then held by a company in which Martin was an officer; and offered him two hundred shares of the stock in question for his services; that he procured the extension of the note, and obtained the \$5,000 from the defendant for the plaintiff; and that the defendant was to have only seven per cent.; that these were the only terms of the agreement. But afterward he urged the defendant to take half of the two hundred shares of stock from him, because they were both so much interested in the stock that he was unwilling to have an advantage in it over the defendant; that the defendant at first refused to take it, but finally consented.

The defendant makes the same statement of the transaction.

JEPHEMIAH LAROCQUE, *for motion.*

WM. C. NOYES, *opposed.*

MITCHELL, Justice. The plaintiff cannot know much about the agreement that the defendant made, as he did not see the defendant until after the loan was made: all he knows is by hearsay from Mr. Martin; and if he has misunderstood what Martin said, and the gentleman from Boston also misapprehended a conversation in which he had no interest, the plaintiff's charge of usury falls to the ground.

This arrangement between Martin and Illius was after the loan had been agreed to be made; and the stock to be received by the defendant was not to come from the plaintiff, but from Martin. As the stock stood in the plaintiff's name, it was consistent with Martin's statement that when he ordered it to be transferred, instead of taking the whole directly to himself, he should cause half to be transferred to himself and half to the defendant, to whom he had promised to transfer it.

The transaction, as stated by the defendant and Martin, is

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free from the imputation of usury, as the whole of the stock was to be given to Martin for his services in procuring the loan, and no part of it to go to the defendant as a condition of the loan. The loan was agreed to be made without regard to the stock, and the shares given to the defendant were given to him, not by the plaintiff, but by Martin; and there was no device or contrivance shown in this. The weight of testimony is decidedly in favor of the defendant. The defendant knew what agreement he made: the plaintiff was not present at the making of it, and could not know except from Martin. The defendant's statement is, therefore, more likely to be correct than the plaintiff's.

Then as between the Boston witness and Martin: the first only states his understanding or recollection of a conversation, and neither Martin nor the defendant has had an opportunity to answer his affidavit. Admissions are the least reliable kind of evidence: what was said or intended may be easily misunderstood, and especially if all is to turn on the use of a word—and a word which might have been inaccurately used by the speaker. One who received stock for effecting a loan would, very probably, say he received it as a bonus, and yet mean as a fee for his services. But the man who conducted the whole negotiation from beginning to end, knows exactly (if he be an intelligent man) what bargain he made for himself, and on what terms he made the loan, and for what reasons he agreed to give up the one half of the stock. He could hardly be mistaken in the statements which he makes; and there is no reason to believe that his statements are intended to be false.

The injunction is dissolved; costs to abide the event.

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SUPREME COURT.

RYAN *agt.* THE ROCHESTER AND SYRACUSE RAILROAD CO.

Held, that no action would lie against defendants for damages arising from injuries done to a person while at work on their land, where the injury happened, as alleged, by reason of the negligence of the defendants in not building a fence on the line of their land upon a precipice, whereby a horse, which belonged to the owner of the land adjoining the defendants' land, escaped from the field on to the defendants' land, and fell down the precipice on to the plaintiff and broke his leg.

No one but the *adjoining owner* or *possessor* of land has any interest in the duty or obligation of another to build or maintain a division fence.

Yates Special Term, April, 1854.—Demurrer to complaint.

The complaint contained two counts, or statements of causes of action.

The first alleged that the plaintiff, on the 7th July, 1852, at Arcadia, in the county of Wayne, was lawfully upon certain lands of the defendants, at labor, near to and beneath a steep bank of earth, which was near to and adjoining a certain field of one Johnson Van Marter; that the defendants were, by reason of their possession of said lands first described, and otherwise, bound to erect and maintain a fence between their said lands and the said field of said Van Marter, to prevent the escape of cattle and horses from said field, or close, on said lands of the defendants, and to prevent the falling of the same down the said bank; that the defendants, disregarding their duty, did not erect or maintain such fence, but wholly neglected so to do, whereby a certain horse of the said Van Marter, being placed by him in the said field adjoining the defendants' said premises, and being lawfully therein, escaped therefrom on to the said lands of the said defendants, and fell down the said bank of earth on to the plaintiff, and broke his leg, and thereby greatly endangered the life of the plaintiff; whereby, also, the plaintiff was deprived of the use of his leg for six months, &c., (stating other consequential damage to the plaintiff.)

The second count stated the possession of the land by the defendants, and that they had dug the earth away from and out of

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the same so as to leave a steep bank or precipice of earth next to and adjoining the field of Van Marter, which bank or precipice was, on the day aforesaid, left by the defendants in a dangerous and improper state, through the default and negligence of the defendants; that it had been and was the duty of the defendants to erect and maintain a fence between their said premises and the said field of Van Marter, suitable and proper to prevent cattle and horses from escaping from said Van Marter's field to the defendants' said premises, and from so escaping and falling down said precipice or bank of earth. Yet the defendants, neglecting their duty and obligation in that respect, wholly omitted to erect or maintain such fence, but suffered and permitted such precipice or bank of earth to remain unprotected and unguarded by such fence: that on the day and year aforesaid, the plaintiff was lawfully employed in labor, at the foot of, near to, and under said precipice, and while so employed a certain horse of said Van Marter, being lawfully placed, and being in said field of said Van Marter, by reason of the want of such fence, and by reason of the neglect and omission of the defendants, as aforesaid, to erect and maintain such fence, and by reason of the said precipice having been left by the defendants in a dangerous and improper state, escaped from said field toward and on to said lands of the defendants, and fell down said precipice on to the said plaintiff, and forced the plaintiff down to and upon the earth under said horse, and broke the leg of the plaintiff, &c., (stating further consequential damage.)

The complaint concludes by demanding judgment against the defendants for \$10,000.

The defendants demurred to the complaint, stating various causes of demurrer.

E. H. AVERY, *for defendants.*

S. K. WILLIAMS, *for plaintiff.*

WELLES, Justice. The gist of the action is the neglect of the defendants to erect and maintain a fence between their land and the land of Van Marter, in consequence of which the

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horse of the latter escaped from the field of its owner to the defendants' land, and fell down a precipice upon the plaintiff, and injured him, he being lawfully there, &c.

The complaint alleges that the defendants were, by reason of their possession of their said lands and otherwise, bound to erect and maintain a fence between their said lands and the said land of Van Marter.

If any liability exists, it grows out of the defendants' duty to erect and maintain the fence, the neglect to do which caused the injury to the plaintiff. But this duty must have been due and owing to the plaintiff, or to him and others, or to the public at large, to give the plaintiff such an interest in the discharge of it as to enable him to maintain an action for its violation. By the common law no man was bound to erect fences either to protect his possession or to entitle himself to a remedy against the trespasses or encroachments of others. Every man was bound to keep his animals within his own enclosures, or be liable to pay damages for such trespasses as they might commit on the lands of others, whether enclosed or not.

In regard to division fences between adjacent owners, our statute requires each to make and maintain a just proportion, unless one of them chooses to let his lands lie open. (1 R. S. 358, § 30, &c., 1st. ed.; 661, 4th ed.)

Section 87 of the same statute, as amended in 1838, declares the consequences of the neglect of any person liable to contribute to the erection or reparation of a division fence, &c. He shall not be allowed to have or maintain any action for damages incurred, but shall be liable to pay the party injured all such damages as shall accrue to his lands, and the crops, fruit-trees, and shrubbery thereon, and fixtures connected with the said land, to be ascertained, &c. (Sess. Laws of 1838, ch. 261.)

It seems to me quite clear that no one but the adjoining owner or possessor has any interest in the duty or obligation of another to build or maintain a division fence. (Bronk agt. Becker, 17 Wend. 820; Ricketts agt. the E. & W. India Docks & B. J. Railway Co., 12 Eng. L. & E. R. 520.)

The first count of the complaint in this case places the de-

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defendants' liability entirely on their neglect to make the fence. The second count combines with it the fact that the bank or precipice which they had made by digging, &c., had been left in a dangerous and improper state through the default and negligence of the defendants. In both counts, however, the damage complained of was in consequence of Van Marter's horse escaping from the land of the latter to and upon the land of the defendants, and falling down the bank upon the plaintiff. In both it appears that except for the horse straying from its owner's field no injury would have happened; and if I am correct in supposing that no one but Van Marter has any ground of complaint against the defendants for neglecting to make and maintain the division fence, the plaintiff cannot sustain an action founded upon such neglect.

If the injury complained of had been the result alone of the defendants' negligence in leaving the bank in a dangerous state, such for example as the earth sliding upon the plaintiff when he was lawfully there, I am not prepared to deny but an action might be sustained. But notwithstanding the allegation in relation to the negligent and dangerous condition in which the bank was left, we cannot fail to see that no damage has happened to the plaintiff excepting by Van Marter's horse falling upon him, which in my opinion gives him no more right of action against the defendants than if the horse, after he had thus escaped, had run over the plaintiff and injured him in the highway.

There is nothing in the complaint to show that the defendants were building a railroad at the place in question or elsewhere, so as to apply the railroad statutes to the case, if that would change the rights or duties of the parties.

The defendants are entitled to judgment on the demurrer, with leave to the plaintiff to amend the complaint on payment of costs.

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SUPREME COURT.

CROWNER agt. THE WATERTOWN & ROME RAILROAD CO.

Where a railroad company, upon an award of commissioners, have recorded the order and deposited the money as required by the 18th section of the general railroad act of 1850, the title to the premises taken becomes wholly vested in the company.

Therefore, where in such case, on a second appraisal, the compensation to the owner of the land is increased by the award of the commissioners, the company can not, by changing the route of their road, avoid the payment of such increased compensation, on the ground that the premises are not necessary for them.

From the affidavits and papers which have been presented and referred to on this motion, it appears that in September, 1852, an appraisal was made of the land of John D. Crowner, over which the Watertown and Rome Railroad Company had located a portion of their route, awarding him the sum of \$340 as damages: that said report was in November, 1852, on the application of the railroad company, confirmed, and the sum awarded deposited in the Jefferson County Bank to the credit of said Crowner, and that an order was duly made in November, 1852, pursuant to the 17th section of the general railroad act of 1850, reciting the substance of the proceedings, and declaring that the company should thenceforth possess and enjoy all the rights over the lands of Crowner given by the act aforesaid. This order was filed and recorded at full length, pursuant to the directions of the 18th section of the act, in the clerk's office of Jefferson county, where the lands appropriated lie.

Within the time prescribed by the act, Crowner appealed from this award, and in April, 1853, the appraisal of the commissioners was reversed by the supreme court, and a new appraisal ordered. The company proceeded to have a new appraisal made, and on this second hearing before the commissioners they awarded Crowner the sum of \$700 damages, thus increasing the amount originally awarded by the sum of \$360. The first award of \$340 has been paid, but the company refuse to pay the increased compensation, on the ground that subse-

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quently to the original appraisal they have so changed their route near the premises in question, that the lands of Crowner are no longer required for the track of their road.

P. GRIDLEY, *for the motion.*

J. MULLIN, *opposed.*

BACON, Justice. On an examination of the provisions of sections 17 and 18 of the railroad act of 1850, I am entirely satisfied that the company are bound to pay this money. In the words and by the necessary operation of the 18th section, on the recording of the order above mentioned and the deposit of the money, both which acts were performed by the company upon the original appraisal, the company were not only entitled to enter upon and use the land appropriated and appraised, but all the parties to the proceeding were divested and barred of all *right estate and interest* in such real estate during the existence of the company. This is in substance and effect a statutory conveyance of the land, wholly divesting the owner of his title, and vesting it in the company. And this necessary effect of the proceeding is recognized by a further provision in this same section, that if on the second appraisal the compensation is increased, the difference shall be a lien upon the land appraised, thus treating it as it truly is, as the land of the company. A lien on one's own land would be a legal absurdity.

The company has an undoubted right to change the route of their road under the circumstances and conditions prescribed by the 23d section of the act of 1850. But this section, or any proceeding under it, has and can have no such effect as either to revest the title to the land appraised in the original owner, or to exempt the company from paying the increased compensation. There is, indeed, provision made in that section for compensation in respect to an injury to *donated lands* where a change of route is made after the company has commenced grading, but there is none whatever changing the rights acquired and the duties imposed by the new appraisal of lands appropriated pursuant to the provisions of the general railroad act. The original owner has a vested right to the increased compen-

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sation, and the company retains the title to the land which became theirs by the terms and the necessary legal operation of the 18th section of the act, and their proceedings under it.

There must be an order directing the money to be deposited in the Jefferson County Bank to the credit of John D. Crowner, within ten days, and in default thereof a judgment may be entered against the railroad company for the amount, and \$10 are allowed to Crowner for the costs of this motion.

SUPREME COURT.

WILSON AND OTHERS agt. WRIGHT.

A *sheriff* is bound to return an execution according to the requisition of the statute, at his peril: in default, he is liable to an attachment or an action at the election of the party aggrieved; and in all cases the onus is on the sheriff to excuse the default.

Where the sheriff, under an indemnity, has sold the property of the defendant and received the money to satisfy the execution, he is not liable to an *attachment* for not paying it over, where it appears that he has been sued by a prior judgment creditor, claiming a portion of the fund. The court will not settle the rights of the parties in such case upon a motion for an attachment.

Dutchess Special Term, July, 1854. This is an application for an attachment against the sheriff of Dutchess county, to compel him to return an execution in the above entitled cause. The execution was delivered to the sheriff by the plaintiffs' attorneys on the 13th of January last. An execution on a prior judgment had been delivered to the sheriff four days before. The defendant had in November preceding executed a general assignment to one Heath, who had sold the goods assigned to Price & Southwick. The plaintiffs in this action indemnified the sheriff. He levied and sold enough to satisfy the execution, and soon after, and before the return day, was sued by Price & Southwick for the goods sold.

DODGE & CAMPBELL, *for motion.*

LEONARD MAISON, *opposed.*

Marquat agt. Mulvy.

DEAN, Justice. A sheriff is bound by law to return an execution according to the requisition of the statute, at his peril. If he neglects it, he renders himself liable to an attachment or an action at the election of the party aggrieved; and in all cases the onus is on the sheriff to excuse the default.

In this case the sheriff comes in and shows by affidavit that he has been sued for the money, and also that a portion of it is claimed by a prior judgment creditor. Under these circumstances, I think it clear that the rights of the several parties cannot be settled by this motion; and that an attachment ought not to issue against the sheriff. For wherever the right of the party claiming the money is in doubt, the court will refuse to interfere on motion and turn him over to his action. (Camp agt. McCormick, 1 Denio, 641; Evans agt. Parker, 20 Wend. 622.) The case of Newland agt. Barker (21 Wend. 264) also recognizes the principle that the mere receipt of the money by the sheriff on an execution will not in all cases make him liable to the plaintiff in the execution for the amount.

The motion must, therefore, be denied, and without costs to either party, and without prejudice to the plaintiffs' right to renew it, after the termination of the action of Price & Southwick against the sheriff.

SUPREME COURT.

MARQUAT, Appellant, agt. MULVY, Respondent.

Where the notice of motion was "to set aside the judgment for irregularity, in this, to wit: in entering up judgment and filing a record thereof subsequent to a full and complete settlement and for such further relief," &c.,—*held*, not to be a motion to set aside the judgment for *irregularity merely*, and, therefore, the order made upon such motion was *appealable*.

Where the defendant was threatened by plaintiff and others accompanying the latter with a prosecution for perjury if he did not accept of a certain sum and give a receipt in full of all demands, to settle a suit in which the defendant had, unknown to him, obtained a judgment of reversal and restitution against

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the plaintiff; at the same time was informed that in case he succeeded against the plaintiff, he would get nothing, as the whole would go to his attorney for costs.

Held, that on such receipt and settlement being obtained from the defendant before the actual entry of the judgment of restitution, and in entire ignorance of the whole matter, by the defendant's *attorney*, that it was illegal, and a fraud upon the defendant's attorney, and was void, as to him. The judgment entered, *after notice of the settlement*, was allowed to stand for the indemnity and protection of the attorney.

While the court will interfere summarily to protect a party from the imposition or fraud of an attorney, it is bound, on the other hand, to shield its attorneys and other officers from the frauds of parties.

Dutchess General Term, July, 1854. Before BROWN, ROCKWELL and DEAN, Justices.—This was an appeal from an order of Justice BARCULO, refusing to set aside a judgment docketed after the parties had settled.

Marquat, in 1851, sued Mulvy in justices' court and obtained judgment for \$48.05: Mulvy appealed to the county court. Prior to the decision in that court, Marquat, on proceedings supplemental to execution, collected of Mulvy the above judgment with costs, amounting to \$74.94. The county court reversed the justices' judgment with costs, and ordered restitution. On this reversal a judgment was entered in that court for \$99.56. The plaintiff appealed to the supreme court. At the January term, 1853, the judgment of the county court was affirmed with costs. The plaintiff and attorneys for both parties resided in Rhinebeck, Dutchess county. At the time of the affirmance of the judgment by the supreme court, and up to the settlement, Mulvy resided in New-York city, and had no knowledge of the result of the suit. His attorney, Mr. Wager, was in Europe. The plaintiff, with a full knowledge of the facts, on the 5th February, 1853, went to New-York and endeavored to settle the whole case for \$10, but failed. On the 8th February the plaintiff again went to see the defendant, and took with him a constable with a warrant against the defendant for perjury, and the justice of the peace before whom the original suit had been tried. They then obtained from the defendant a receipt for \$10 in full of all demands, claims, &c. They, however, paid him \$12. The defendant's attorney had

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no knowledge of this arrangement between the parties, and on the 10th February gave notice that on the 14th he would apply to the clerk for the entry of judgment, &c. The plaintiff's attorney then gave notice of the arrangement between the parties. The defendant's attorney disregarded this, and proceeded with the entry of judgment, and had the same docketed for \$169.72. The plaintiff on affidavit moved at the March special term to set aside the judgment for irregularity, &c. The defendant and his attorney on affidavits opposed the motion. Judge BARCULO referred it to a referee to take proofs, &c., as to the fairness of the settlement. The referee reported that as to Mulvy he thought the settlement could not be impeached; but as to his attorney, Wager, or his costs, included in the judgment, that it was not fair. Judge BARCULO, on the coming in of this report, denied the motion to set aside the judgment, and from that order the plaintiff has appealed.

M. CONGER, *for appellant.*

A. WAGER, *for respondent.*

By the court, DEAN, Justice. An objection was taken on the argument, that as the notice of the plaintiff's attorney was to set aside the judgment for "irregularity," that it was not appealable. The notice did not stop with setting aside the judgment for irregularity, but adds, "in this, to wit: in entering up judgment and filing a record thereof subsequent to a full and complete settlement," &c. This clearly is not merely an irregularity, although the plaintiff's attorney has called it such. I think the order an appealable one, and that the motion should now be decided on the merits.

Mulvy in his affidavit says that the plaintiff in the first interview on the 5th February, told him the "old suit" was still going on. He further says that he had no knowledge of the decision in his favor, and that he was threatened by plaintiff and those who accompanied him with arrest for perjury if he did not give the receipt; they also told him that in the event of a decision in his favor he would get nothing, but his attorney would retain the whole for fees. He says that under these

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circumstances—in the absence of his attorney in the action—in ignorance of the true state of facts, and to avoid an arrest for perjury, he signed the receipt, and the constable then *surrendered the warrant to him*. It is very clear, therefore, that a part of the consideration with Mulvy on the settlement was this release from arrest, or liability to arrest on the warrant. And as this was illegal, both on the part of the plaintiff and defendant, and affects materially the rights of an innocent party—the defendant's attorney—I think the settlement was void, and should not be regarded by this court.

There is an additional reason why this arrangement between the parties should be held invalid, growing out of the duty of the court to protect its officers. The affidavits show that Mulvy is utterly irresponsible. A judgment had in justices' court been obtained against him. From this he appealed to the county court, and at last it got into this court, where a final judgment had been rendered. Mr. Wager, his attorney, had followed it all the time. He had, in addition to his own services, been necessarily compelled to expend a considerable sum in disbursements, and to allow this act of the parties to stand would leave him without any redress. It is impossible after reading the papers submitted on this motion, to doubt that the object of the plaintiff in seeking the defendant at the time he did, and subsequently employing the means that were used, was to avoid the payment of the costs which had been adjudged against him, and which equitably belonged to the defendant's attorney. I do not think it necessary in this case to give an opinion upon the point which seems at present disputed as to the lien of an attorney on the judgment for his costs. The court has the custody of its own records and the control of its process, and while it will interfere summarily to protect a party from the imposition or fraud of an attorney, it is bound on the other hand to shield its attorneys and other officers from the frauds of parties. By rigidly enforcing this rule, we shall best protect both attorney and client, and prevent attempts at undue and unfair practices.

As the county court ordered restitution to the defendant of

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the amount collected of him on the justices' judgment, there is probably enough in the judgment in this court to pay the defendant's attorney, after deducting the \$12 paid to the defendant on the 8th February, 1853. It may be equitable to allow that as a payment. I think, therefore, that the order refusing to set aside the judgment should be affirmed, and the defendant's attorney should be directed to collect the judgment, less the \$12 and interest thereon.

Ordered accordingly.

NEW-YORK COMMON PLEAS.

THE PEOPLE *ex rel.* CORLIS *agt.* SMITH.

The marine court of the city of New-York have no jurisdiction to issue final process against the person of a defendant.

At Chambers, August, 1854. This was a certiorari issued to the keeper of the Eldridge-street (debtors') prison, to certify the cause of the detention and imprisonment of the relator.

It appeared from the return made by the keeper that the relator was held by him under a commitment in execution, in the nature of a "*Ca. Sa.*," issued by the marine court of this city, in an action brought by one Ready against the relator for money collected by the relator, as the agent of the plaintiff, and fraudulently misapplied. The marine court rendered judgment against the relator, and an execution issued against his property being returned unsatisfied, the commitment under which he was held was issued. (See *Laws relative to the City of New-York*, p. 490.)

A. R. DYETT, *for the relator*, asked for his discharge on the ground that the marine court had no jurisdiction in such an action to issue any execution or final process against the person. He cited and relied upon *Brown agt. Treat*, 1 *Hill*, 225; *Laws*, 1831, chap. 287, § 1, 29, 30 to 33, 47; *Code*,

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§§ 53, 54, 65. § 179 of the Code had no application to the marine court. See § 8 of Code.

DALY, Judge. *Held*, that the marine court had no jurisdiction to issue the process, and discharged the relator accordingly.

SUPREME COURT.

TILLOU agt. SPARKS.

Where a defendant sued as a public officer obtains judgment upon a *report of referees*, he is entitled under the statute (2 R. S. 617, § 24) to double costs, the same as if judgment had been rendered upon a verdict.

Held, that the above mentioned statute, giving *double costs* to public officers, sued as such, was not intended to be and is not repealed by the Code. (*It would seem that the many decisions upon this subject reported in this work are about equally divided upon the question, whether this statute is repealed or not.*)

Poughkeepsie Special Term, September, 1854.

H. A. NELSON, *for plaintiff.*

J. F. BARNARD, *for defendant.*

DEAN, Justice. The defendant, as a constable of the county of Dutchess, levied two executions against N. L. Shafer on personal property in his possession. The plaintiff, claiming title to it, commenced an action against the defendant to recover possession of the property. Defendant justified under the executions. The cause was referred by consent of parties, and the defendant succeeded on the reference.

The defendant having been sued as a public officer, now applies to the court for double costs. The plaintiff opposes the motion on two grounds. *First*. That the statute does not apply to cases where the defendant has judgment on a reference, and cites 19 *Wend.* 225, and Calkins agt. Williams, 1 *Code Rep. N. S.* 53. The case cited from *Wendell* is not in point, as it is on a different section of the statute limiting double costs to cases wherein there is a *verdict*. Here the defendant relies upon 2 R. S. 617, § 24, which gives a public

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officer, sued as such, costs when a judgment is rendered for him, "upon verdict, demurrer, non-suit, non-pros., discontinuance of the plaintiff, or *otherwise*." I am quite certain that judgment on the report of a referee is included within both the terms and intent of the statute. But the second objection, viz., that § 303, Code of 1852, has abolished all statutes giving double costs, is one on which I have entertained very great doubt, and which I fear cannot be settled without the interference of the legislature. I have examined with care the various and conflicting decisions which have been made on this subject, but have been unable to find any one which satisfies my mind that there was any intention on the part of the commissioners of the Code, or the legislature that adopted it, to alter the rule which gives the public officers a protection against unfounded actions for official conduct. I do not regard the section of the revised statutes to which I have referred as a statute "regulating or establishing the costs or fees of attorneys." These were regulated and established by another statute; and then this provision, for the benefit, not of the attorney, but the party, 2 R. S. 617, § 24, 25, is introduced.

As the question on both sides has been quite fully discussed by different judges, I shall content myself with merely stating as I have, the conclusion to which I have arrived, without going at any length into the reasons which have led to it. Motion granted, with \$10 costs.

SUPERIOR COURT.

CYNTHIA SMITH, BY EDWARD SMITH, HER NEXT FRIEND, agt.
JAMES KEARNEY AND MCGREGOR M. STANIELS.

A complaint which relates to the *separate* property of the wife cannot be filed by her and her husband as plaintiffs; she must sue by her *next friend*, and her husband can not be such. (*This is adverse to the decision in the case of Risher and wife agt. Morris and wife, ante p. 266.*)

Smith agt. Kearney & Staniels.

Special Term, April, 1854.—This was a motion on the part of the defendants to set aside the appointment of Edward Smith, as next friend of the plaintiff, on the grounds that he was her husband, and that no order had been made for his appointment.

W. McDERMOT, *for motion.*

H. H. WHEELER, *opposed.*

HOFFMAN, Justice. This suit is brought to recover certain property seized by the defendant, Staniels, upon an execution issued on a judgment in favor of the other defendant, Kearney, against Edward Smith, the next friend in the complaint. The plaintiff Cynthia, his wife, claims the property; and having taken it upon claim and delivery, the undertaking to the sheriff has been given and perfected. It is now objected that the husband cannot be a next friend, that no order appointing him as such has ever been entered, and that he is wholly irresponsible. Some uncertainty prevails as to the practice on this subject; and in the late case of Rusher and her husband against Morris, (Supreme Court, April 10th, 1854, since reported, 9 *Howard*, 266,) Justice ROOSEVELT sustained a bill of foreclosure, brought by husband and wife, of a bond and mortgage given to the wife since the act of 1848, therefore her sole and separate property. The learned judge, in order to protect the wife, adopted, as an applicable rule, the practice of obtaining her written consent, upon a private examination, to a disposition of the fund to her husband, or any other person, otherwise to be paid to herself. The learned judge refers to the practice formerly known in chancery of taking such an examination before funds of a married woman were taken out of court. The practice of the court of chancery on this point was not fully settled, so far as reported cases proved it, until a late period Lord HARDWICKE stated the general rule to be, that a bill by husband and wife was a bill of the husband, and the suit was under his control: that where it related to the separate property of the wife it ought to be brought by her *prochein ami*. However, there have been cases of such a bill by hus-

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band and wife, and the court has taken care of the wife, and ordered payment to some person for her. (Griffith agt. Hood, 2 *Ves.*, *Sen.* 452.) It may, however, be stated that the fixed rule of the court of chancery in England and in this state has for many years been, that where the separate estate of the wife is concerned the suit must be by a next friend.

If there is a joint interest with the husband, he must be a party, or the suit would be defective. He is therefore allowed to sue with her, the court, in the result, taking care of her interest in the joint fund. But if the estate was equitably her own, and solely her own, a next friend other than the husband was essential. Reeves agt. Dulby, 2 *S. and St.* 464; Sigel agt. Phelps, 7 *Simons*, 239; Simons agt. Horwood, 1 *Keene*, 7; England agt. Downs, 1 *Beavan*, 96; Wake agt. Parker, 2 *Keene*, 59; Bowers agt. Smith, 10 *Paige*, 201; Alston agt. Jones, 3 *Barb.*, *S. C. R.* 397; Grant agt. Van Schoonhoven, 9 *Paige*, 257; Sherman agt. Burnham, 6 *Barbour*, 414; Hugh agt. Evans, 1 *S. and S.* 185, point to the distinction between a suit for a joint interest and one for a separate estate of the wife. It should be carefully noticed that, if a suit is directly against a husband, of necessity she must sue by a next friend. The exception in divorce cases was by statute. Coit agt. Coit, 4 *Howard*, 232, and 6 *Howard*, 53, is an instance of this character since the Code. Now the very idea of a separate estate is an estate held by the wife in opposition to a marital right. Therefore her position is antagonistic to his as to such property, whatever may be the actual union of views and acts between them. At any rate, no point was more entirely settled before the Code.

The 114th section, as originally passed, gave rise to several questions; and in 1851 an amendment was adopted presumptively to remove them. It is now provided, that when a married woman is a party her husband must be joined with her, except that where the action concerns her separate property she may sue alone, and that when the action is between herself and her husband she may sue or be sued alone. But where the husband cannot be joined with her as herein provided, she shall prosecute or defend by her next friend.

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It must be observed that the last clause is unmeaning, unless the words, "may sue alone," in the above preceding clauses, mean simply she is to sue without her husband. Under the grammatical construction of these clauses there is no case provided where the husband cannot be joined with the wife. The phraseology is simply permissive, to sue alone; not prohibitory of uniting with the husband. There is, then, no sensible construction of the whole to be found except in reading the provision thus: When a married woman is a party the husband must be joined in the action, except that if the action concern her separate property the husband cannot be joined with her, but she must sue by a next friend; and when the action is between herself and her husband, she shall prosecute or defend by her next friend. My conclusion is, that upon clear authority before the Code, and upon a true interpretation of the Code, a complaint which relates to the separate property of the wife cannot be filed by her and her husband as plaintiffs, that she must sue by her next friend, and that her husband cannot be such. This result renders it unnecessary to pass upon the other questions.

The order will be, that the plaintiff, Cynthia Smith, have liberty to amend her complaint within ten days, by striking out the name of Edward Smith as her next friend, by adding the name of some other person as such, after being duly appointed by order of the court, with liberty, if advised, to make the husband a party-plaintiff or defendant. The plaintiffs to pay \$10 costs, or such amendment not to be allowed. In case no amendment is made within the time limited, or no order obtained extending such time, or the \$10 costs are not paid, the complaint to be dismissed with costs.



People *ex rel.* Stuart agt. Edmonds.

SUPREME COURT.

THE PEOPLE *ex rel.* SIDNEY H. STUART agt. FRANCIS W. EDMONDS, Chamberlain of the City of New-York.

By an act of the legislature passed July 11, 1851, the board of supervisors for the city and county of New-York are authorized to increase the salaries of the police and civil justices and clerks elected and appointed under the act of 1848 for said city: and the salaries to be thus fixed are *not to be increased or diminished* during the term for which they are elected or appointed.

Therefore *held*, that a resolution of the board of supervisors of the 27th December, 1853, allowing to the relator, as a police justice, \$866.66 for extra services, performed on Sundays, was null and void, and in contravention and violation of the statute of 1851. Under their general powers, the board of supervisors had authority to allow this remuneration, but the act of 1851 had restricted them.

New-York Special Term, September, 1854. This is an application made on behalf of Sidney H. Stuart, one of the police justices of the city of New-York, for a peremptory mandamus, commanding the chamberlain, in his capacity of treasurer of the county, *ex officio*, to pay him the sum of six hundred and sixty-six dollars and sixty-six cents, for a compensation directed to be paid to him by the resolution of the board of supervisors of the 27th December, 1853, for extra services.

The relator was elected one of the police justices of the city in November, 1851, and entered upon the duties of his office on the following May, and has ever since continued to discharge those duties.

JOHN W. EDMONDS, *for relator.*

ROBERT J. DILLON, *for chamberlain.*

CLERKE, Justice. The question to be considered is, whether the board of supervisors had the power to make this allowance for extra services. Under the general power, which they possess by common law and by statute, they can allow all amounts chargeable against the county, (1 R. S. 367, § 4,) which comprise the prosecution and conviction of criminals, and all contingent expenses necessarily incurred for the use and benefit of the county.

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The services alleged and admitted in the present case have been rendered, in my opinion, to the county, as contra-distinguished from the city in its municipal capacity.

The office of police justice is not of municipal but common law origin; it is entirely independent of the charter; and, if we were reduced by a repeal of it to the *status* of a mere county, this office would still essentially survive, exercising duties, always belonging, according to the general law of the land, to justices of the peace.

The legislature, to be sure, has distributed the duties of the justices, as far as this city is concerned, and has directed that the civil and criminal business should be discharged by different classes: one class to be confined exclusively to civil, and the other to criminal business. But this is merely a convenient division of labor, an arrangement which may be adopted with equal benefit, whenever the population or circumstances of any locality render it desirable, whether possessing or not a municipal charter.

Besides, even if this office were purely municipal, and entirely co-existent with and dependent upon the charter, still, if the services were rendered to the county, the board of supervisors had authority to grant compensation for those services, or for county services rendered by any individual, whatever may be his occupation, office, or condition.

The services, which they intended to compensate by the resolution of 1853, were rendered by the police justices on Sundays, which, by the common law, no public officer is under any obligation to perform, but which, in a crowded and heterogeneous population, are absolutely necessary to prevent rioting and disorder, and the escape of criminals.

The board of supervisors, then, having the general authority to order this additional compensation, the only question that remains, in this stage of the inquiry, is, whether they have been restricted or prohibited from doing so by the paramount authority of the state legislature, or, in other words, has their general power in this respect been curtailed.

In chapter 153, *Laws* 1848, p. 249, in the 9th section of an

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act in relation to justices and police courts in the city of New-York, passed March 30th, 1848, it is provided, "that the justices shall receive such an annual compensation for their services as shall be fixed by the common council, which shall be in lieu of all fees and other perquisites, and shall not be increased or diminished during their continuance in office, and shall receive no other perquisites whatever by virtue of their offices."

Pursuant probably to this act, the board of supervisors by a resolution of 23d April, 1851, allowed the police justices for services rendered by them on Sundays, from the 9th day of May, 1848, to the date of the resolution, "at the same rate of compensation *per diem* as the salaries then paid them, for services performed in the ordinary business and legal days of the week;" that is, they increased the salaries one-sixth for those additional services, and this, they had undoubtedly the power to do.

By an act of the legislature, passed July 11th, 1851, section 6th, this 9th section of the law of 1848, above referred to, was repealed, and for the increase of duties created by this act (including the services rendered on Sundays) the board of supervisors are authorized to increase the salary of the justices and clerks elected and appointed under the act of 1848; and the salaries to be thus fixed are *not to be increased or diminished* during the term for which they are elected and appointed.

According to this act, then, the board of supervisors, while authorized to increase the salaries of officers elected and appointed under the act of 1848, during the term for which they are elected and appointed, are absolutely prohibited, after thus increasing and fixing, *from again increasing or diminishing their salaries*. This prohibition applies to the police as well as to the civil justices, for both are equally appointed and elected under that act—the 4th, 5th, 6th, and 10th sections applying specially to the civil justices, and the 7th and 8th to the police justices; the other sections applying in common to both.

Pursuant to the power given by the act of 1851, the board of supervisors, by a resolution of January 2d, 1852, fixed the salaries of the police and civil justices at two thousand dollars

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per annum, "to be in full for services rendered by them on Sundays as well as all other duties assigned them."

As we have observed, they had specific power to do this by the act of 1851; but, having done so, they are positively restrained, by the same act and section, from making any further increase during the continuance of the term for which the incumbent has been elected.

The relator was elected in November, 1851, his term of office to commence on the following May, for four years.

How, then, in the face of the statute of 1851 could the board of supervisors pass the resolution of December 29, 1853, ordering the police justices to be paid for extra services at the rate of one-sixth of the compensation they now receive, contemplating evidently extra compensation for the services rendered by them on Sundays; although by resolution of January, 1852, it is expressly specified that the salary of two thousand dollars per annum is to be in full for services rendered by them on Sundays?

This resolution appears to me to be in contravention and violation of the act of 1851; and, although under their general powers, as I have already shown, the board of supervisors had full power to allow this remuneration, yet as the supreme legislative authority has thus limited those powers, the resolution of 1853 is null and void.

Having arrived at this conclusion, it is unnecessary to consider the points taken by the counsel of the defendant, whether the amount claimed was payable by the comptroller, or chamberlain, and consequently whether a *mandamus* could be granted against the latter, even if the relator were entitled to the amount which he demands.

It was mentioned on the argument in support of the relator's claim, that the police justices were entitled to a larger salary than the civil justices, and that both classes of officers by the resolution of 1852, being placed on an equality in this respect, allowing to both without distinction \$2,000 per annum, the resolution of 1853, giving an increase to the former, was equitable, and should be favorably entertained by the court. I

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readily admit that both in the nature and amount of their labors the duties of the police justices are much more onerous and severe than those devolving on the justices of the inferior civil courts. They have to attend at unseasonable hours, and with little intermission for relaxation or repose; they are even excluded from the sacred rest of the Sabbath; they are constrained to witness, day after day, scenes most revolting to humanity—scenes calculated to make the hardest heart mourn over the destitution and moral ruin of our race; they have human nature perpetually and practically before them, in its vilest and rudest aspects; and the actual physical and mental toil which those duties impose must be seriously detrimental to their health.

But, in my opinion, this inequality and inadequacy of remuneration can only be corrected by the intervention of the legislature—by the repeal or amendment of the act of 1851.

The application must be denied.

SUPREME COURT.

MOORE, &c., agt. CALVERT.

The Code, by allowing the motion to *discharge from arrest* to be made any time before the justification of *bail*, shows that if it was intended to restrict the right to make the motion to that period, it was to be so restricted only in cases where bail was given, and *in existence* at the time of the motion—not where the bail were discharged, nor where they had surrendered the defendant, nor where he had been charged in execution by the plaintiff.

Where, on a motion to discharge the defendant from arrest, it appeared that the plaintiff, when he procured the order for arrest, swore to the fraudulent acts of the defendant *as of his personal knowledge*, and it turned out that these acts and conversations of the defendant, (in making a purchase of goods,) which were alleged to be fraudulent, were made with a clerk of the plaintiff, and by him communicated to the plaintiff, who also relied on a personal recommendation of the defendant from the clerk, *held*, that the defendant be discharged.

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It is of great importance that the original affidavit, upon which an order of arrest is granted, should be candidly and carefully drawn, and state correctly what is alleged on information, and what on deponent's personal knowledge.

New-York Special Term, Feb. 1854.—A motion is made to discharge the defendant from custody under an execution.

When the action was commenced an order of arrest was made, and the defendant gave bail, and the bail being excepted to, justified. The complaint at first alleged the purchase of goods by the defendant, and that the purchase was made on fraudulent representations. After the bail justified, the charge of fraud was struck from the complaint, and the defendant then made no defence, and judgment was taken against him as on contract merely; and an execution was issued against his person founded on the order of arrest and the affidavits then made, and he was committed to prison. He now applies for his discharge.

CLARK & REED, *for motion.*

B. F. DUNNING, *opposed.*

MITCHELL, Justice. The Code, § 204, says, that a defendant arrested may, at any time before the justification of *bail*, apply on motion to vacate the order of arrest. In Barber agt. Hubbard (3 Code R. 167, 171) this court held that such a motion may be made, when bail do not justify, after the time for justification of bail had expired; and expressed the opinion that if the defendant was at large on bail, and then took another step in the cause which, from its nature, assumed that it was proper to require bail—as by causing the bail to justify—that might be considered a waiver of the objection to being held *to bail*; but distinguished this from the case of a defendant lying in jail.

The Code, by allowing the motion to discharge from arrest to be made any time before the justification of *bail*, shows that if it was intended to restrict the right to make the motion to that period, it was to be so restricted only in cases where bail was given—as the justification of bail is the test—it could not apply where no bail was given. It may also be inferred that

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it was intended to be restricted only to cases where bail were in existence at the time of the motion, as bail with the liabilities of bail—not where they were discharged and ceased to be bail—and therefore not where they had surrendered the defendant in exoneration of themselves, or where he had been charged in execution by the plaintiff, and they were thus discharged by the act of the plaintiff. While the plaintiff allowed the defendant to be at large in custody of his bail only, the defendant (if his bail had justified) could not make this motion; but as soon as the bail, by their act or the act of the plaintiff, ceased to be liable as bail, and the defendant ceases to have the benefit of their assumption for him, then the defendant's rights are restored as if there had been no bail. A different rule might compel a defendant to lie in jail during a long litigation, and even after the end of it, when he was in reality not guilty of any wrong, simply because he had once put in bail. It is not too late, therefore, to make this motion.

As the commitment on the execution is founded only on the facts alleged as the ground for the order of arrest, these facts are now to be examined in the same manner as if the motion were to discharge from arrest.

The order of arrest was made on affidavits of Moore, one of the plaintiffs, and of Ely, their clerk. Moore stated, not on information or belief, but as if it were a matter within his knowledge, what representations the defendant made to the plaintiffs as to his circumstances, and then stated the representations as made to the plaintiffs themselves; and to make it appear still more certain that these matters were within his own knowledge, he concluded his affidavit by stating that the facts about the assignment afterward made by the defendant, and all *subsequent* matters, he derived from Ely.

Ely then swore that the affidavit of Moore was true of his own knowledge; but went on to specify that he saw the assignment, and that the defendant then stated the matters set forth in Moore's affidavit as occurring subsequent to the assignment. This specification, taken in connection with Moore's affidavit, would confirm the opinion that Moore intended to swear as of

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his own knowledge as to the representations made at the purchase of the goods.

The defendant now shows that he never conversed with the plaintiffs on the subject of his circumstances; and the plaintiffs and Ely now admit such to be the fact, and say that the conversation was with Ely, and by him communicated to Moore. This is so contrary to the representations made in the first affidavits, that it ought not to be received. It is of exceeding importance that the original affidavits, on which the order of arrest is made, should be candidly and carefully drawn, and state correctly what is alleged on information and what on the deponent's personal knowledge. The order of arrest is granted *ex parte*, without hearing the defendant, and may put him to very serious inconvenience; and it would properly be refused if it were perceived that facts stated as if known to the deponent were known only on information.

The defendant here has disproved the plaintiffs' case as he chose to make it at first, and has no opportunity now to meet the new statement of the plaintiffs and their clerk, giving a *new face* to the transaction.

James Calvert also swears, in substance, that Ely said the purchase was made on his (Ely's) *knowledge* of Calvert alone. Robert Calvert confirms this, and also says that *Moore* said he would not have sold to the defendant if he had had his own way, as he knew nothing about him except what Ely *said* about him, not what Ely told him the defendant had said about himself; and it also appears that Ely wrote to the defendant requesting him to come to the plaintiffs' store and buy of them. The defendant did not seek them out; they, through their clerk, sought him as a buyer.

The defendant should be discharged from custody, he stipulating not to bring any action for false imprisonment; and he should have \$10 costs of the motion.

Skeel agt. Thompson.

SUPREME COURT.

RUFUS R. SKEEL agt. GARDINER G. THOMPSON.

An individual having "his principal place of business" in the city of New-York, and with his family residing in Newburgh, in which latter place he is taxed for his *personal property*, is not entitled to an *equitable injunction* to restrain the collection of such tax, whatever the law may be applicable to the proper assessment of such tax, where he does not show that he is taxed in both places for the same property, nor that there is any injustice in the matter.

New-York Special Term, April, 1854. This is an application for an injunction to stay the collection of a tax of \$311.25 on the personal property of the plaintiff, assessed to him as a resident of the town of Newburgh, in the county of Orange, whereas his true residence and place of business, he alleges, is in the city of New-York.

MARTIN, STRONG & SMITH, *for the motion.*

R. A. SOUTHWICK, *opposed.*

ROOSEVELT, Justice. The plaintiff, it will be observed, does not pretend that he is taxed in both places, nor does he deny that, if relieved from the Newburgh taxation, he will escape altogether. What equity, then, does his claim present, calling for the *extraordinary* interposition of the court by way of injunction? Either the assessment is valid or it is void—if valid, there is, of course, no ground of complaint in any form—if void, the collecting officer, by taking and selling the plaintiff's furniture in Newburgh, will be a trespasser, and like any other trespasser, on a trial by jury in the ordinary way, will be mulcted in damages.

The plaintiff's original residence, it would seem, although doing business in New-York, was in Newburgh. He paid his personal tax there in January, 1853, and also a tax on real estate situated there. In May, 1853, after an absence of about four months, he returned with his family to Newburgh, taking possession of his former residence, and from that time down to the present he and his family have continued to occupy the house in Newburgh, purchased by him in or prior to the spring

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of 1851. The temporary occupation of a house in New-York, for a few months, "to escape taxation," cannot be regarded on this motion. It may be, that New-York having been "his principal place of business," he ought, under the new law, to have paid his personal taxes here. But he did not. What hardship, then, under the circumstances, is there in compelling him to pay elsewhere? Had he fairly stated his case to the officers in New-York, and upon such statement been assessed in New-York, and had he then pleaded that assessment before the officers in Newburgh as a ground for being passed over by them, a proper case for injunction and interpleader might, perhaps, have been presented. But as the case now stands, whatever may be the strict law applicable to it, there is obviously no equity, and, of course, no ground for the issuing of an equitable injunction. Motion denied with costs.

SUPREME COURT.

HERBERT T. MOORE agt. JAMES COCKROFT.

The Code only permits necessary disbursements *allowed by law*, and requires a statement of these in detail.

A charge of \$12.50, sheriff's fees—taking and delivering property—is not proper—no such allowance to a sheriff.

An argument of a motion for a new trial on a case, at special term, is neither an issue of law nor an issue of fact, and an allowance of \$25 costs, therefore, is improper. Only \$10 costs, in the discretion of the court, can be allowed, besides a fee of \$10, under sub. 8, § 307 of the Code, for every circuit or term at which the cause is necessarily on the calendar, excluding that at which it is *tried or heard*. This last allowance applies to cases, special verdicts and appeals, as well as issues of law and fact.

Dutchess General Term, July, 1854. BROWN, ROCKWELL and DEAN, Justices.

COSTS.—This was an appeal from an order on a motion to strike out certain items of costs inserted in the judgment.

SAMUEL COCKROFT, *for appellant.*

L. B. PERT, *for respondent.*

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By the court. DEAN, Justice. There was no affidavit of attendance of witnesses such as the statute requires. The Code has not altered the law on this subject. The affidavit, in order to justify an allowance of witnesses' fees for travel or attendance, must state positively that the witnesses attended the trial, and the time each attended, and the distance that each necessarily traveled from his place of residence in order to attend. The Code only permits necessary disbursements *allowed by law*, and requires a statement of these in detail. The charge of \$12.50, sheriff's fees, taking and delivering property, must be stricken out under this, as I know of no such allowance to a sheriff.

The Code has defined an issue of law and an issue of fact, the argument of a motion for a new trial on a case, at special term, is neither, and the only way of getting costs for that is an allowance of \$10 in the discretion of the court. The \$15 must, therefore, be stricken from the bill. But as a motion for a new trial goes upon the calendar, and subdivision eight of § 307 of the Code provides a specific allowance of \$10 for every circuit or term at which the cause is necessarily on the calendar, excluding that at which it is *tried or heard*—this allowance of \$10 is not limited to issues of law or fact, but applies also to cases, special verdicts and appeals; this allowance was, therefore, proper. The costs must be corrected in the above particulars.

SUPREME COURT.

RICHTMYER agt. HASKINS.

Under §§ 153 and 168 of the Code, as amended in 1852, there can be no demurrer to an answer which does not contain new matter constituting a counter-claim. Such a demurrer, when put in, must be considered a nullity. (*See Hopki agt. Everett*, 6 How. Pr. R. 159; *Salinger agt. Lusk*, 7 id. 430; and *Winer agt. Teed*, ante p. 143; *adverse*—and *Thomas agt. Harrop*, 7 id. 5; *Loomis agt. Dorshimer*, 8 id. 9; *Simpson agt. Loft*, 8 id. 234, and *Roe agt. the Saugerties & Woodstock Turnpike Co.*, 8 id. 237, in accordance with this decision.)

Section 154 should have been amended when the 153d section was amended, striking out the word "defence," and inserting "counter-claim." But taking § 154 as it stands, its only legal effect is to declare that the defendant may apply for judgment, when the plaintiff omits to reply, or demur to an answer requiring a reply or demurrer.

Albany General Term, Feb. 1854.

Present WRIGHT, HARRIS, and WATSON—Justices.

Demurrer to answer.—The action was for slander. The defendant interposed several defences, and, among others, alleged that the slanderous words were spoken under circumstances which rendered them privileged. To the latter defence the plaintiff demurred. The demurrer was argued at the Schoharie circuit, in September, 1853, before Mr. Justice W. F. ALLEN, who made an order overruling the demurrer, and rendering judgment thereon for the defendant, with leave to the plaintiff to withdraw the demurrer, or, if necessary or proper, to reply to said answer, on payment of twenty dollars costs of the demurrer within twenty days after service of the order. From this order the plaintiff appealed to the general term.

L. FALK, for plaintiff.

L. TREMAIN, for defendant.

By the court. HARRIS, Justice. In *Arthur agt. Brooks*, (14 Barb. 533,) there was a demurrer to a part of an answer, which was overruled at the special term, and, upon appeal to the general term, the order was reversed. In that case, as in this, the question, whether the plaintiff had a right to demur to the answer, was not raised by counsel.—Nor was it noticed by the court.

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In *Bogardus agt. Parker*, 7 *Howard*, 303, and *Noxon agt. Bentley*, 7 *How.* 316, demurrers to answers were considered and decided without any notice of the question whether such a demurrer was an authorized pleading. It does not, however, distinctly appear that either of these cases arose subsequent to the amendments of the Code adopted in 1852. Perhaps it should be assumed that they arose before, for then such demurrers were authorized: for, as the 153d section of the Code stood, before the amendments of 1852, the plaintiff might demur to any answer which contained new matter constituting a defence or set-off. In each of the cases above cited, the answer pretended to allege such new matter, and of course the plaintiff might demur.

It was held in *Hopkins agt. Everett*, 6 *How.* 159, that the word "same," as it is found in that clause of the 153d section, which authorizes a demurrer to an answer for insufficiency, refers to the word "answer" in the commencement of the section, and not to the term "new matter," and that, therefore, a demurrer for insufficiency would lie to any answer, even though it contained but a denial of the plaintiff's allegations. The same construction was asserted, and much insisted on, by the same judge in *Salinger agt. Lusk*, 7 *Howard*, 430, and it is there stated that the construction given to the section in question, in *Hopkins agt. Everett*, had been affirmed by the general term in the second district. But while I embrace the occasion to express my admiration of the talents and learning of that distinguished judge, whose judicial labors death has closed but too soon, I cannot assent to the soundness of his construction of the language in question. I agree with him that the word "same" refers to the word "answer," as its antecedent. I go further, and agree with him that the word "same," in the section, does not refer to the term "new matter." But I cannot concur in the conclusion which has been drawn from these premises, which is, that because the word "same" refers to the "answer," and not to "new matter," *therefore*, a demurrer for insufficiency will lie to *every answer*. On the contrary, I understand that while the word "same" in the clause which

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authorizes a demurrer, refers to the word "answer," it is to such an "answer" as is described in the section; an answer "containing new matter constituting a defence or set-off," as the section stood before the amendments of 1852, and, after those amendments, "an answer containing new matter constituting a counter-claim." It is of such an answer alone that the section speaks. It is to such an answer alone that its provisions apply.

This construction of the section under consideration is supported by the opinions of some of the ablest judges in the state. In *Thomas agt. Harrop*, (7 *How.* 57,) Mr. Justice MASON, when considering a demurrer to an answer, said, "It is only where the answer sets up new matter constituting a defence, and which would require a reply from the plaintiff, that he can, under the present system, demur to the answer." In *Loomis agt. Dorsheimer*, (8 *Howard*, 9,) MARVIN, J., says, in reference to the language of the 153d section, as it stood before it was amended in 1852, "The word 'same,' as here used, relates to the kind of answer previously mentioned in the section, that is, an answer containing new matter. It seems to me that this is the obvious construction, and that the plaintiff was not permitted to reply or demur, unless the answer contained new matter by way of defence." The same construction has been given to the section by the superior court of New-York. In *Quinn agt. Chambers*, (11 *Leg. Obs.* 155,) the plaintiff had demurred to such parts of the defendant's answer as contained new matter. Upon this demurrer an order had been made declaring the same frivolous, and rendering judgment for the defendant. Upon appeal from this order, Mr. Justice BOSWORTH said, "There seems to have been a misapprehension, by both parties, of the existing provisions of the Code in relation to the cases in which a plaintiff may demur. There cannot now be a demurrer to new matter in an answer constituting a defence, unless such new matter sets up a counter-claim." In this decision chief justice OAKLEY and justices DUER, PAINE, and EMMET concurred.

Even Mr. Justice BARCULO, in *Salinger agt. Lusk*, admitted

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that the alteration in section 153 of the Code, in 1852, seemed to indicate an intention to avoid or annul his decision in Hopkins agt. Everett. But he was still inclined to think the legislature had been unsuccessful in giving effect to its intention; and that, even yet, the grammatical as well as legal construction of the section would allow a demurrer to an answer in all cases of insufficiency, whether it should appear in a denial or in new matter.

The only other judge who has, in any published opinion with which I have met, given the same construction to the 153d section, which it received in Salinger agt. Lusk, is Mr. Justice WELLES. That distinguished judge, in Wisner agt. Teed, (9 How. 148,) after conceding that, "looking at the section by itself, and regarding its grammatical construction, the view that, in order to authorize the plaintiff to test the sufficiency of an answer by a demurrer, it must amount to a counter-claim is, to say the least, plausible," was inclined to think, in view of *other sections*, and the evils and inconveniences to which such a construction would lead, *that it was not so intended*.

The "other sections," which my learned brother invokes to help out his theory, and to overcome what he concedes to be the construction demanded by the section itself, are the 154th and the 155th. It is not to be denied that the 154th section contemplates a reply or demurrer to an answer containing a statement of new matter constituting a defence. But it is also true, that there is nothing in that section which authorizes a party either to demur or reply in any case. The section should, undoubtedly, have been amended when the 153d was amended, by striking out the word "defence" and inserting "counter-claim." (See opinion of Bosworth, J., in Quinn agt. Chambers above cited; also the very sensible opinion of MILLS, county judge, in Williams agt. Upton, 8 Howard, 205.) But, taking the section as it stands, its only legal effect is to declare that the defendant may apply for judgment, when the plaintiff omits to reply or demur to an answer requiring a reply or demurrer. Thus we are referred back to the 153d section to see when a reply or demurrer to an answer is requisite. That sec-

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tion, as I have attempted to show, only authorizes a demurrer or reply when the answer contains matter constituting a counter-claim. The 168th section declares that any other new matter alleged in an answer is to be deemed controverted without further pleading, so that the only practical effect of the 154th section is to allow the defendant to move for judgment when the plaintiff has omitted to reply or demur to an answer alleging matter constituting a counter-claim.

I suppose, too, that it was through inadvertence that the 155th section was left by the legislature to stand in the Code at all. To make the system of pleading it now prescribes harmonious, that section should have been stricken out altogether. But, taking it as it is, it does not affect the question under consideration. It simply declares that the defendant may demur to a reply. It leaves the question, when a reply is a proper pleading, to be determined by other provisions in the Code. Here again we are referred back to the 153d section, to see when a reply is allowable; and, "looking at that section by itself," it is conceded that a reply or demurrer to an answer is allowable only when it contains matter constituting a counter-claim. (See opinions of CRIPPEN, J., in *Silliman agt. Eddy*, 8 *How.* 122, and CADY, J., in *Putnam agt. Deforest*, 8 *How.* 146.)

The learned judge whose opinion I am now considering has honored me overmuch. Passing by the opinions of justices MASON and MARVIN, already cited, and the judgment of the five judges of the superior court of New-York on the question, he only refers to two brief opinions of my own on the subject, and thus makes me stand single-handed in the "conflict of opinion" with my lamented brother BARCULO. I think I have shown that, so far from occupying this perilous position, I am supported by a weight of authority which might well be deemed conclusive upon the question.

I am conscious that I am protracting this discussion quite too much, yet I cannot forbear noticing, for a moment, the argument *ab inconvenienti*, upon which both the judges, who maintain the right of demurrer to an answer in all cases, so much rely. Mr. Justice WELLES thinks there is no way of testing

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the sufficiency of an answer when it is neither sham, irrelevant, redundant, nor frivolous, except through a demurrer. I cannot better answer this argument than by employing the language of Mr. Justice BARCULO himself:—"I hold it to be correct practice," he says, in Fox agt. Hunt, (8 How. 12,) "at the circuit, to lay out of the case all irrelevant allegations, as well as the immaterial issues contained in the pleadings, and hold the parties to trial upon the material issues or points in the case; and if the complaint does not contain a good cause of action, or the answer does not contain a defence, I direct judgment accordingly." No judge, at all familiar with trials at *nisi prius*, will hesitate to subscribe to the soundness of this rule. The legislature, I suppose, had in view this very practice when it abolished the demurrer to an answer, except in the case of a counter-claim, which in its nature is a complaint in a cross-action. Assume this practice to prevail at the circuit, and what evils or inconvenience can arise from the want of a demurrer to an answer? Let the case now under consideration serve for an illustration. The action is for slander. The defendant has denied the allegations in the complaint. He also relies upon the statute of limitations. He insists, in the third place, that he was privileged to say what he is charged with having said. The plaintiff has demurred to the third defence. The issue of law thus made was noticed for trial, and argued at the Schoharie circuit in September, 1853. The demurrer was overruled with leave to reply, &c. From this order an appeal has been taken, and the demurrer re-argued at a general term. Thus a year has been consumed in disposing of a demurrer to one of the defences. If the decision at the special term is sustained, the cause goes back to the circuit for trial upon the pleadings unchanged; for by the 168th section of the Code, the allegations in that part of the answer to which the demurrer is interposed are to be deemed controverted without further pleading. If the decision at the special term is reversed, and the demurrer is allowed, still the cause goes back for trial upon the other issues. The result is, that three trials must be had—and how many more is yet to be seen.

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Now, suppose there had been no demurrer to the answer; the new matter alleged in the answer, being at issue by the operation of the 168th section, the cause would have been set down for trial upon all the issues, at the same circuit at which the demurrer was argued. The plaintiff might have failed upon the prior issues in the action; but if not, and the parties had come to the third defence, the question might then have been presented, whether the matters alleged in the third defence were sufficient to constitute a defence to the action. If the court had been of opinion that the matters so alleged were insufficient, the defendant would not have been allowed to go into proof to sustain that issue. If, on the other hand, it had been regarded as a sufficient defence, being controverted, the parties might have proceeded with their proof upon that issue, and thus the whole case might have been disposed of at a single trial. And so, as a general thing, I think every experienced lawyer will agree with me, that while a demurrer is the cause of great delay and expense, but little progress is made by means of it in establishing the rights of the parties. It may sometimes be very desirable to have the law of the case settled before the trial, but it adds very seriously to the labor of the court and the expense of the litigants. At any rate, I can perceive no great danger to the rights of the parties from giving effect to the intention of the legislature by refusing to decide upon the sufficiency of an answer in anticipation of the trial upon the merits. For myself, so far am I from regarding the practice proposed to be established as either *absurd* or *inconvenient*, that I should not hesitate, were I acting as a legislator instead of a judge, to abolish the demurrer to an answer altogether, believing, as I do, that justice between parties may be more cheaply and speedily, and quite as certainly, obtained without a preliminary trial upon such an issue.

As the demurrer was an unauthorized pleading, the court had no authority to render judgment upon it. It was a nullity, and the order overruling it was also void. It should therefore be reversed, but without costs to either party.

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SUPREME COURT.

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A *demurrer* to an answer not containing new matter constituting a counter-claim is a nullity, on which no judgment can legally be given for either party. New matter, in an answer not relating to a counter-claim, is put in issue by § 168 of the Code. Under that section it has no other effect than a notice of special matter had under the former system of pleading.

Sections 153 and 168 of the Code having been amended in 1852, leaving section 154 standing as it did in 1851, full effect can not now be given to the latter section; it being in conflict with § 168, the latter must prevail. Section 154 must be considered a dead letter, unless confined to answers containing new matter constituting a counter-claim. (*It will undoubtedly be noticed as quite remarkable, the similarity of reference and reasoning in this opinion with that of Richtmyer agt. Haskins, ante, p. 481.*)

Montgomery Special Term, September, 1854. This is an action on a policy against loss by fire. The defendant put in eight answers, and the plaintiff has demurred to the 1st, 2nd, 7th and 8th. And one answer given to the demurrers is, that the answers demurred to do not contain any new matter constituting a counter-claim; and that, therefore, the plaintiff's demurrers must be regarded as nullities.

JOHN WELLS, *for plaintiff.*

WM. A. BEACH, *for defendant.*

CADY, Justice. There has been, and still is, a difference of opinion, and have been contrary decisions, as to the question presented in this case, and I cannot claim that my own opinion has been uniformly the same as to a plaintiff's right to demur to an answer not containing new matter constituting a counter-claim.

The courts have not on all occasions promptly noticed the rapid changes the legislature has made in the Code.

In Arthur agt. Brooks, (14 Barb. 538,) sections 158 and 168 of the Code, as amended in 1852, were not referred to by the counsel or the court. The decision in that case cannot, therefore, be regarded as giving any construction to those sections.

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In *Salinger agt. Lusk*, (7 *How. Pr. R.* 480,) it was held, that a plaintiff might in all cases demur to an answer for insufficiency. Some of the cases referred to in that case do not support the opinion there given.

Noxon agt. Bentley, (7 *How. Pr. R.* 316,) was argued in June, 1852, and the case does not show when the pleadings were put in; but the probability is, that they were put in before the amendments of the Code, in that year, were in force. There is, in that case, no allusion to sections 153 and 168, as amended in 1852.

In *Bogardus agt. Parker*, (7 *How. Pr. R.* 803,) it does not appear when the demurrer was put in. The defendant in that case did not object that the plaintiff could not demur, because the answer did not contain new matter constituting a counter-claim; on the contrary, he seems to have claimed that the new matter set up in the answer did constitute a counter-claim.

The cases collected in *Voorhies' Supplement*, page 93, as I understand them, show that the weight of authority is against a demurrer to an answer, unless the answer contains new matter constituting a counter-claim. And an examination of the history and object of the Code of Procedure and its various amendments, will, I believe, lead to the conclusion, that a demurrer to an answer not containing new matter constituting a counter-claim, is a nullity, on which no judgment can legally be given for either party.

Before the Code the pleadings in an action might be a declaration; as many pleas as the defendant chose to put in; a replication to each plea; a rejoinder to each replication; a sur-rejoinder to each rejoinder; a rebutter to each sur-rejoinder; a sur-rebutter to each rebutter; and a demurrer to each sur-rebutter. Although such pleadings were allowable, they seldom occurred in practice.

The 24th section of the 6th article of the constitution of 1846 made it the duty of the legislature at its first session, after the adoption of that constitution, to provide for the appointment of three commissioners, "whose duty it should be to review, reform, *simplify* and *abridge* the rules and practice,

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pleadings, forms and proceedings of the courts of record of this state, &c.” One object of the convention was, that pleadings should be simplified and abridged. This injunction in the constitution the legislature obeyed; and by the 8th section of chapter 59 of the Laws of 1847, appointed three “commissioners on practice and pleadings;” and it was made their duty “*to provide for the abolition of the present forms of actions and pleadings at common law, &c.*” Old forms and rules of pleading were to be abolished, and new rules introduced. And under that enactment the commissioners went to work; and by section 118 of the Code of 1848, it was enacted as follows: “All the forms of pleadings heretofore existing are abolished; and that hereafter the forms of pleading in civil actions and the rules by which the sufficiency of pleadings is to be determined shall be those prescribed by this act.” We must look, therefore, to the Code in order to ascertain what pleadings are authorized, and how their sufficiency is to be determined. By section 119 it was enacted, that the first pleading on the part of the plaintiff should be a *complaint*; and by section 121 it was enacted, that “the only pleading on the part of the defendant is either a demurrer or an answer.” By section 131 it was enacted, that “when the answer shall contain new matter the plaintiff may within twenty days reply to it,” &c. And by section 132 it was enacted, that “no other pleading shall be allowed, than the complaint, demurrer, answer and reply.”

By the Code of 1848 the plaintiff was not allowed to demur to the answer under any circumstances. If it contained new matter he might reply, but not demur to it. If he believed the new matter in the answer did not constitute a defence, he might have a trial on the complaint and answer under section 130 of the Code of 1848. This gave to the plaintiff all the advantages of a demurrer *ore tenus*. This section was omitted in the Code of 1849.

By section 153 in the Code of 1849, when the answer contained new matter the plaintiff was authorized to reply to it, or he might *demur* to the *same* for insufficiency.

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By section 153 of the Code of 1851, when the answer contained new matter *constituting a defence*, or set off, the plaintiff might reply to such new matter; and he might allege any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer; or he might demur to the same.

But the legislature in 1852, supposing that section 153 was not entirely perfect, amended it, so that it is as follows: "When the answer contains new matter *constituting a counter-claim*, the plaintiff may within twenty days reply to such matter, denying generally, or specifically, each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer; or he may demur *to the same for insufficiency*, stating in his demurrer the ground thereof; and the plaintiff may demur to one or more of several counter-claims set up in the answer, and reply to the residue." This is the only section of the Code under which a plaintiff can now claim a right to reply, or demur to an answer. And, as I understand that section, so far as the question under consideration is concerned, it ought to be read as in *Voorhies' Supplement*, page 98.

The plaintiff has his election to reply or demur to an answer containing new matter constituting a counter-claim; and he must reply or demur to such answer, or every material allegation in it, constituting a counter-claim, will, by section 168, be held as admitted. That section shows the construction which ought to be given to section 153. By section 168 the allegation of new matter in the answer, *not relating to a counter-claim*, is to be deemed controverted by the adverse party, as upon a direct denial, or avoidance, as the case may require. New matter in an answer not relating to a counter-claim is put in issue by section 168; the defendant must prove it on the trial; and the plaintiff may disprove it, or prove any new matter to overthrow it; or, if the defendant proves it, the plaintiff may insist that it does not constitute any defence. Under section

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168 an answer stating new matter not constituting a counter-claim, has no other effect than a notice of special matter had under the former system of pleading.

By section 153, when the answer contains new matter constituting a counter-claim, the plaintiff may reply to such new matter, &c., or he may demur to *the same* for insufficiency; and the plaintiff may demur to one or more of several *counter-claims* set up in the answer, and reply to the residue. If the answer contains but one counter-claim, the plaintiff may reply or demur to it. If the answer contains several counter-claims, the plaintiff may demur to one or more of them, and reply to the residue. In *Salinger agt. Lusk*, the learned justice who decided that case held, that the word "*same*," in section 153, referred to the answer, and not to the new matter constituting a counter-claim; and hence he came to the conclusion that a plaintiff might in all cases demur to an answer for insufficiency. But it will probably be found difficult to state any difference between the new matter in answer constituting a counter-claim and the answer itself. Suppose an answer contains new matter constituting one counter-claim; I wish to know the difference between the answer and the new matter, which not only constitutes the counter-claim, but constitutes the answer itself? When an answer contains new matter constituting a counter-claim, the counter-claim is the answer, and the answer is the counter-claim. There may be an answer which does not constitute a counter-claim; but there cannot be a counter-claim which is not an answer. If the counter-claim be *insufficient*, the answer will be *insufficient*; and the plaintiff cannot demur to the answer, without demurring to the counter-claim, because they are identical.

Section 167 authorizes a plaintiff to unite several causes of action in one complaint, but they must be separately stated; and each of those separate statements, in legal effect, constitutes a complaint. And section 151 authorizes a defendant to demur to one or more of several causes of action stated in the complaint, and answer the residue. A demurrer to one of the causes of action stated in the complaint, is a demurrer to that

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part of the complaint in which the cause of action demurred to is stated.

Section 150 authorizes a defendant to set forth by answer as many defences and counter-claims as he may have—they must each be separately stated. This is nothing more than authorizing a defendant to put in as many answers as he pleases. And, as has already been stated, the plaintiff by section 153 is authorized “to demur to one or more counter-claims set up in the answer, and reply to the residue.” It can not be denied that this latter clause of section 153 gives to a plaintiff a right to demur, or reply only to counter-claims; or, in other words, to such parts of the answer as contain one or more counter-claims. And this seems to furnish a decisive argument, that the right, before given in the same section, to demur, must be limited to a counter-claim. If the former part of the section gives to a plaintiff a right, in all cases, to demur to an answer for insufficiency, for what purpose was the last clause added? One rule in the construction of a statute is, that the “whole be so construed, that if it can be prevented, no clause, section or word shall be superfluous, void or insignificant.” (1 *Show.* 108.) Apply that rule to section 153, and how is it to be construed? The first part of the section applies to an answer, which contains new matter, constituting a, or one, counter-claim; and then the plaintiff may reply to such new matter, which is the answer; or he may demur to the same for *insufficiency*. And the last part of the section provides for the case, where the answer contains several counter-claims; and then the plaintiff may demur to one or more of the counter-claims, and reply to the residue. Or, in other words, he may demur to one or more of the parts of the answer containing counter-claims, and reply to the residue. Each counter-claim must be regarded as a separate answer.

A defendant, by section 150, may set forth, by answer, as many defences and counter-claims as he may have. Suppose he set forth six distinct defences; each of three of them consists of new matter, constituting a counter-claim; and each of the other three of new matter not constituting a counter-claim:

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may the plaintiff, by virtue of section 153, reply, or demur to each of the six defences? If the answer contains several counter-claims, each counter-claim must constitute a sufficient defence to the action, or to some part of it; or it may be demurred to for insufficiency. If the counter-claim constitute a good defence to the action, or to any part of it, then it must be replied to; or the new matter alleged therein will, by section 168, be regarded as admitted. But, if the new matter in the answer does not constitute a counter-claim, then, by the section last cited, neither a demurrer nor reply is necessary. Because, by that section, such new matter is put in issue, and that is an issue of fact; which, while it is on the record, each party has a right to insist shall be tried by a jury. It cannot be disposed of on a demurrer. No judgment which the court can legally give on a demurrer, will take from a defendant the right to have the issue of fact, created by § 168, tried by a jury. A judgment for the plaintiff on a demurrer, to an answer containing new matter not constituting a counter-claim, does not authorize the court to order the answer to be struck out: it will remain on the record as an issue of fact to be tried. It may be asked, what remedy the plaintiff has when an answer contains new matter not constituting a counter-claim, and he believes such new matter does not constitute a defence? He may have a perfect remedy on a motion to strike out the new matter, and that remedy may be had in less time, and at less expense, than on a demurrer, even if a demurrer were allowable. New matter, which does not constitute a defence, must be either redundant or irrelevant matter. If the whole answer consists of new matter, not constituting a defence, then the plaintiff has a remedy by moving for judgment under section 247 of the Code: and if the plaintiff has doubt whether the new matter constitutes a defence, he can suffer the issue to be tried, and if found against him, he may then move for judgment, notwithstanding the verdict.

Although in *Salinger agt. Lusk*, (7 *How. Pr. Rep.* 439,) justice BARCULO held, that "an answer of this kind could not be got rid of, except by demurrer;" yet, the same learned judge,

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in Fox agt. Hunt, (8 *How. Pr. R.* 12,) said, that he "held it to be the correct practice at the circuit to lay out of the case all irrelevant allegations or the immaterial issues contained in the pleadings, and hold the parties to trial upon the material issues or points in the case; and if the complaint does not contain a good cause of action, or the answer does not contain a *defence*, I direct judgment accordingly."

This shows that the very distinguished judge had discovered how an immaterial answer could be disposed of otherwise than upon a demurrer. If this practice be the correct one—as I have no doubt it is—it shows that a demurrer to an answer, containing new matter not constituting a counter-claim, is wholly unnecessary and useless. The plaintiff, without putting in a reply, or a demurrer upon the record, may, upon the trial, have all the advantage of both a reply and a demurrer.

As the legislature has, in terms, given to a plaintiff a right to reply, or demur to an answer containing new matter constituting a counter-claim; and as to answers containing new matter not constituting a counter-claim, have given to him, without a reply or a demurrer, all the benefit he could have by both or either of them, I cannot believe that the plaintiff has any more right to reply or demur to an answer not constituting a counter-claim, than a plaintiff under the old practice had to reply or demur to a notice of special matter given with the general issue.

In Wisner agt. Teed and others, (9 *How. Pr. R.* 143,) WELLES, Justice, held that a plaintiff might demur to an answer containing new matter not constituting a counter-claim; and that learned judge seems to have rested his opinion on section 154 of the Code. That section, in the Code of 1851, was in perfect harmony with sections 153 and 168. But, in 1852, sections 153 and 168 were amended, and section 154 left as it was in 1851. And full effect cannot now be given to that section consistently with section 168; and when they conflict with each other, the latter must prevail. By section 154, "If the answer contain a statement of new matter constituting a defence, and the plaintiff fail to reply or demur thereto, &c., the defendant may move,

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on a notice of not less than ten days, for such judgment as he is entitled to on such statement," &c. But can a defendant now successfully make any such motion, unless the matter in the answer constitute a counter-claim? Would not section 168 furnish a perfect answer to any such motion? Say an answer contains new matter *constituting a defence*, but not a counter-claim, the plaintiff neglects to reply, and the defendant moves, under section 154, for judgment, would not the plaintiff defeat the motion by reading a part of section 168, as follows: "But the allegation of new matter in the answer, not relating to a counter-claim, &c., is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require?" This part of the section puts the new matter in the answer, not relating to a counter-claim, in issue without a reply; and being put in issue without a reply, the defendant could not be entitled to judgment under section 154. That section is a dead letter unless confined to answers containing new matter constituting a counter-claim. When an answer contains such new matter, and the plaintiff neglects to reply or demur, then the defendant may move for judgment under section 154; because, by section 168, every material allegation of new matter in an answer constituting a counter-claim, not controverted by the reply, as prescribed in section 153, shall, for the purpose of the action, be taken as true. Section 154 must now be understood as if the word *defence* in the second line was *counter-claim*, and if so understood, it will furnish no support to the opinion in Wisner agt. Teed.

The only argument, in favor of allowing a plaintiff to demur to an answer containing new matter not-constituting a counter-claim, is, that the plaintiff ought to have an opportunity of testing the validity of the answer before the trial. But is there any force in this argument? The plaintiff and his counsel can see what new matter is alleged in the answer, and the plaintiff will know whether it is true or false; and he can be prepared to explain, or disprove it, as well without a right to reply to it as with such right. And the plaintiff's counsel will have as much time to examine the new matter alleged, and ascertain

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whether, if proved, it will constitute a defence, as he would have on a demurrer. And if after examination he is of opinion that the new matter, if proved, will not constitute a defence, he will object to the evidence offered to prove the special matter, and that will present to the court a question as to the admissibility of the evidence.

Questions of like character are raised on almost every litigated trial. If the opinion of the court be against him, he will except and appeal; and the rights of parties will be decided in this way with more expedition, and less expense, than on a demurrer.

I am, therefore, of opinion, that the demurrer in this case is a nullity, and that no judgment can be entered thereon for either party.

SUPERIOR COURT.

CHARLES S. BROWN agt. WILLIAM WARD, JOSEPH W. WARD,
and DAVID H. WARD.

Stocks of a company, pledged as collateral security, may be sold at public auction after the debt is due, upon a demand of payment, and notice of the time and place of sale, (which, in the city of New-York, may be at the Merchants' Exchange,) unless a sale is restricted by positive stipulation. Any other mode of sale must rest upon express agreement.

It is otherwise with promissory notes, or commercial paper, pledged as collateral security. In such case the pledgee must hold the paper until maturity, and collect and apply the money to the payment of the loan.

Special Term, May, 1854.—The action is upon a promissory note, made by the defendants in favor of the plaintiff, and dated the 23d of September, 1853.

The defendant, Joseph W. Ward, demurred. A motion was noticed for this day to strike it out as frivolous, and for judgment. On the 5th the defendant obtained an order to show cause on this day why an answer annexed to the order should be allowed

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to be served. The defence set up in the answer is, that the plaintiff had received certain bonds of the Rock River Railroad Company as collateral security for this and another note of the defendants; that these bonds were given without any authority or consent to sell the same if the amount was unpaid. Nevertheless, the plaintiff has sold the same without his consent. He prays, by way of counter-claim, the excess of the value of the bonds over the debt.

T. H. RODMAN, *for plaintiff.*

P. T. WOODBURY, *for defendants.*

HOFFMAN, Justice. The demurrer, admittedly, cannot be sustained. In order to raise the question fully, it has been agreed upon the trial, that a notice given by the plaintiff to the defendants of the intended sale of the bonds at the Merchants' Exchange for the 27th of April, 1854, unless the note was previously paid, should be considered as before the court; also the receipt of the plaintiff given upon getting the bonds, and an affidavit showing the sale, a previous notice of a week in several of the daily newspapers, and a sale at twenty-eight per cent. on their par value. The proceeds were about \$1,120. The notes were payable at six months from their respective dates. And the agreement expressed in the receipt was, that they were to be returned to Ward, Brothers & Company upon the payment of the said notes, or a proportionate part as each was paid.

In Wheeler agt. Newbold in this court, April, 1853, the action was for the recovery of the sum of \$611.73. Certain promissory notes had been deposited as collateral security for a loan of \$2,000. The amount of the collaterals was \$2614.78. The debt not being paid at maturity, the collaterals were sold at private sale for \$2,020. Notice of his intention to sell was given by the holder.

The plaintiff took the ground that the collaterals could only be sold at public auction after notice of the time and place.

But chief justice OAKLEY held, for the purposes of the trial, that a loan upon the pledge of commercial paper did not give the lender the right to sell the paper at all. That if the loan

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was not paid at the time agreed upon, the lender might hold the paper until maturity, and collect and apply the money to the payment of the loan, and upon this ground directed the jury to find a verdict for the plaintiffs for the excess of the collaterals over the amount of the loan and interest. But the judge stated that as the point was new, and of great practical importance in this city, he should direct the judgment to be suspended until a case was made to be heard at the general term.

The case was not carried up, but the decision was approved by the judges upon consultation.

But the court did not intend to question or modify the general law well established, as to the sale of securities of personal property, other than mercantile paper, pledged as collateral security for a debt. Since the time of the case of *Hart agt. Ten Eyck* before chancellor KENT, (2 *John Ch. Rep.* 62,) the right of the pledgee to sell after the debt is due, upon reasonable notice, has been unquestioned; and a custom has grown up; and has been sanctioned by the courts, of selling stocks at the Merchants' Exchange.

The leading case of *Tucker agt. Wilson*, which was decided by the house of lords, reversing unanimously lord HARCOURT's decree, is strikingly similar to the present case. There was a loan secured by exchequer annuities, the transfer to be void upon payment at a particular day, without power to sell; a default of payment; notice of sale; a sale at the Exchange by a sworn broker, at the then fair value; and a bill to redeem. The only difference is, that the borrower desired a delay of a week in selling. (See *Br. P. C. p.* 384.)

In *Little agt. Barker*, (1 *Hoffman's Ch. Rep.* 488,) fifty shares of stock of the Staten Island Bank were deposited as collateral security for a loan of money upon a note, with authority to sell on nonperformance of the promise. Afterward a receipt was given, taken as a substitute for the note, which expressed that forty shares of such stock were received as collateral security for the \$2,000, the amount of a note dated that day, "which I agree to convey on the prompt payment of the same." The court considered the law to be, that if no notice

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had been given of the sale of stocks pledged, the pledgee could be called upon to replace them, paying the amount of the debt. But that the title of the purchaser could not be affected without proof of his personal knowledge of the loan and pledge.

In *Castello agt. the City of Albany*, (1 *Legal Observer*, 25, 1842,) before me as assistant vice-chancellor, the question arose in this form: The hypothecation of stock was general, without any power to sell expressly given. The pledge was to secure a running account. Demand of the balance was repeatedly made. The pledgee then caused the stock to be offered at the board of brokers, where he offered it at the rate of fifty-three per cent., which he could not get. He afterward sold it at private sale, without notice of the time or place.

The case of *Wood agt. Hamilton* in the superior court, and others, were referred to as deciding that a sale at the board of brokers of stock pledged could not be made without an express stipulation to that effect; and that a sale to be valid must be upon reasonable notice, and at public auction. And it was held that the defendant must replace the stock or allow for the difference in value on his debt.

Applying these authorities to the present case, I consider that a right to sell stock held as collateral security follows the pledge, unless restricted by positive stipulation; that such right might be exercised, after the debt is due, upon a demand for payment, and notice of the time and place of sale at public auction, which in New-York may be at the Merchants' Exchange. Any other mode of sale must rest upon express agreement.

The distinction between the cases which I have cited, and that of *Wheeler agt. Newbold* is apparent. It would be most injurious in a mercantile community, where commercial credit is of so delicate a character, to allow the notes of a party to be exposed for sale before their maturity. But the stocks of a company, like those of a government, are the subjects of common transfer and sale, without the possibility of such an objection attaching.

The result is, that judgment must be entered for the plaintiff for the amount demanded, with interest and costs.*

* On consultation, this decision was approved by a majority of the court.

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SUPREME COURT.

DARIUS ALLEN and others agt. THE FRANKLIN FIRE INSURANCE COMPANY.

In case of an assignment by a debtor to a trustee for the benefit of his creditors, the assignor is a competent witness for the assignee, or trustee, in an action brought by the latter for the recovery of a demand belonging to the trust estate. Though interested in the event, the action is not prosecuted for the assignor's immediate benefit.

(*This is adverse to the decision in the case of Fitch agt. Bates*, 11 Barb. 471, and agrees with *Davies agt. Cram*, 4 Sand. S. C. R. 355, and *Catlin agt. Hansen*, 1 Duer, 309.)

As it respects the question of interest, the doctrine of the Code is, that a witness shall not be rejected because he has an interest in the event of the action, even though that interest be direct and immediate. But he shall be rejected when the suit is prosecuted or defended for his immediate benefit; as where he is a party to the action, or, though not a party upon the record, is the real party in interest.

Where the action is brought by the assignee against the defendant as a contracting party with the assignor, notice, under the 399th section, that the assignor will be examined as a witness is not necessary.

(*This is adverse to the case of Knickerbocker agt. Aldrich*, 7 How. Pr. R. 1.)

That provision relates to cases where the parties to the transaction in controversy are not parties to the action, and applicable only to cases where the adverse party in the action appears before the court in a representative capacity. This objection can only be made when it is proper to examine an assignor as a witness against an assignee or an executor or administrator.

An equity of redemption in a chattel mortgage, is sufficient to constitute an insurable interest.

Albany General Term, February, 1854.

Present, WRIGHT, HARRIS, and WATSON, Justices.

Appeal from judgment on report of referee. The defendants, by a policy of insurance, bearing date the 21st of April, 1851, agreed to insure Fellows, Corps & Co. against loss or damage by fire, to the amount of \$1,000, on certain machinery and fixtures in the city of Troy. On the 5th of July, the property insured was destroyed. Notice and proof of the loss were duly given. On the 18th of August following, Fellows, Corps & Co. made a general assignment of their property and effects to

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the plaintiffs for the benefit of creditors. This action was brought by the assignee to recover the amount of the policy with interest.

On the 8th of March, 1851, Fellows, Corps & Co. had executed a chattel mortgage upon the property insured to Allen and Waterman, to secure the payment of \$2,500 with interest, payable on demand. Other policies of insurance upon the same property, at the time the mortgage was executed, and of which the defendants when they made their policy were duly notified, had been assigned to the mortgagees as collateral security. The defendants insisted in their answer that by means of this incumbrance the interest of the insured in the property was reduced to a sum vastly below the amount of the insurance; that Fellows, Corps & Co. had fraudulently withheld from the defendants the knowledge of this incumbrance.

Upon the trial before the referee, Lewis Fellows, one of the assignors, was offered as a witness on behalf of the plaintiffs. He was objected to on the ground that, being an assignor, no notice had been given of his examination as a witness, and also because, having made a general assignment for the benefit of creditors, he was a real party in interest. The objections were overruled, and the defendants excepted to the decision. The referee reported that there was due to the plaintiffs the sum of \$1,065.78. Judgment having been perfected on the report, the defendants appealed.

W. A. BEACH, *for plaintiffs.*

H. W. MERRILL, *for defendants.*

By the court. HARRIS, Justice. It is insisted that the decision of the referee in allowing the witness, Fellows, to be examined, was doubly erroneous: first, because the suit was prosecuted for his immediate benefit; and, second, because, though otherwise competent, the defendants were entitled to notice that he would be examined upon the trial. Both grounds of objection are sustained by authority. In *Fitch agt. Bates*, (11 *Barb.* 471,) where an insolvent debtor had assigned his property in trust for his creditors, it was held that the assignor

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was not a competent witness in a suit by the assignee for the recovery of a demand belonging to the trust. And in *Knickerbocker agt. Aldrich*, (7 *Howard*, 1,) it was held that the notice required by the 399th section of the Code must be given in all cases, where the assignee would avail himself of the testimony of his assignor upon the trial. Other courts, however, have taken a different view of the provisions of the section in question. See *Davies agt. Cram*, (4 *Sand. S. C. R.* 355,) *Catlin agt. Hansen*, (1 *Duer*, 309,) *Bean agt. Canning*, (10 *Leg. Obs.* 248.) What effect is to be given to these provisions may therefore still be regarded as a question open for consideration. I proceed to examine it.

At common law, a witness was disqualified when he had any legal, certain, and immediate interest in the event of the action. The 398th section of the Code abrogates this rule. It declares that the witness shall no longer be held to be disqualified for such cause. But for the succeeding section a witness could never be rejected on the ground of interest. That section retains the common law rule so far as it would disqualify a party to the action, or any other person for whose immediate benefit the action is prosecuted or defended. So far, then, as it relates to the question of interest, the doctrine of the Code is this: that a witness shall not be rejected because he has an interest in the event of the action, even though that interest be direct and immediate. But he shall be rejected when the suit is prosecuted or defended for his immediate benefit. If the owner of a debt bring his action to recover it, and afterward assign the demand, the suit may proceed in the name of the original plaintiff, but it will be prosecuted for the immediate benefit of the assignee. If the debt is collected, he will have the legal right to receive it. If the plaintiff is unsuccessful in the action, he will be ordered to pay the costs of the defence. Though his name does not appear upon the record, he is the real plaintiff in the action. In such a case the assignee not only has a legal, certain and immediate interest in the event of the suit, but it is prosecuted for his immediate benefit. The inquiry, therefore, is no longer whether or not the witness will

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gain or lose by the result, but it is whether he is a real party to the action. In other words, whether he will take the fruits of the action if successful, or bear the loss if unsuccessful. A residuary legatee will gain or lose by the success or defeat of an action brought by the executor. The amount of his residuum will be increased or diminished as the result. But it cannot be said that the action is prosecuted for his immediate benefit. He has no right to take the conduct of the suit—success will enure to his ultimate benefit, and thus he has the legal interest which, at common law, would disqualify him as a witness; but he would have no right to receive the money, if collected, nor would he be under any obligation to indemnify the executor, if defeated. Thus, while he has a legal, certain, and immediate interest in the event of the suit, it is not prosecuted for his immediate benefit. It is so, I think, in the case of an assignment by a debtor to a trustee for the benefit of his creditors. The assignor has a direct interest in having the demands he has assigned collected. His own liabilities will thereby be satisfied. But he has no right to the moneys collected. He has no right to control the suit. He incurs no liability in case of defeat. Though interested in the event, the action is not prosecuted for his immediate benefit.

This construction of the terms used in the 399th section is sustained by the corresponding provision found in the 396th section, which authorizes the adverse party in the action to examine "the person for whose immediate benefit the action is prosecuted or defended, in the same manner and subject to the same rules of examination as if he were named as a party." Thus the real party in interest may be regarded by the adverse party as the party to the action. Such a party is called "the person for whose immediate benefit the action is prosecuted or defended." No one would pretend that any person, whatever his interest in the event of the suit, could be examined as a witness under the provisions of the Code authorizing the examination of a party to the action, if he be not, in truth, the real party in interest. Suppose that, in *Fitch agt. Bates*, above cited, the Leonards, the assignors, had been examined under

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the authority contained in the 396th section, on the ground that they were the persons for whose immediate benefit the action was prosecuted, I apprehend that even the learned judge who pronounced the decision in that case would not have allowed the examination to be read on the trial. And yet, if the Leonards were the persons for whose immediate benefit the action was prosecuted, the 392d section of the Code would authorize either party to read their examination, as the examination of a party. Nor will it be pretended, I am sure, that the corresponding terms in the 399th section have any broader application than the same terms in the 396th section. If in the latter section they apply only to the real party in interest, they must also be so construed in the 399th section.

The construction which, in Fitch agt. Bates, has been given to the clause under consideration, completely neutralizes the 398th section of the Code, and, in effect, retains the common law rule of disqualification: "If the result of the cause will *directly* and *immediately* affect any right or interest of the person proposed as a witness, and adversely, if against the party calling him, then, says Mr. Justice HAND, 'he is inadmissible.' " "At common law," says the same learned judge, "the interest, to disqualify, must be some legal, *certain*, and *immediate* interest in the result of the cause." The two propositions, as I understand them, are in substance identical, and thus, what was intended to be a mere restriction upon the operation of the general principle declared in the 398th section, is made to destroy it altogether—a construction which will produce this effect must, of course, be defective. Instead of the common-law rule, which disqualified the interested witness, the legislature intended to adopt the general principle that a witness should not be excluded on the ground of interest. This is declared in the 398th section. To prevent misapprehension, and not to impair the operation of the general principle, it was declared in the next section that it should not be applicable to parties to the action, nor, as I understand the language adopted by the legislature, to those who, though not parties upon the record, are the real parties

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in interest. I agree with Mr. Justice Duer, in Catlin agt. Hansen, above cited, that the words "parties to the action," in the 399th section, are to be construed as meaning parties upon the record; and that by persons "for whose immediate benefit the action is prosecuted or defended," the legislature meant persons who are parties in interest, and who, as such, will be concluded by the judgment as effectually as though they had been parties to the record.

It being determined that the witness, Fellows, was not disqualified by reason of his interest in the event of the suit, the remaining inquiry is, whether the plaintiffs could avail themselves of his testimony without giving the notice specified in the last clause of the 399th section. Here, again, I am constrained to differ with my learned brethren in the fourth district. The construction given to this provision in Knickerbocker agt. Aldrich, above cited, cannot, as it seems to me, (and I say it with the most undissembled respect for the distinguished judges whose decision I thus venture to question,) be sustained. To prevent fraud and injustice, the legislature, in the original adoption of the Code, had declared that when it should appear that an assignment had been made for the purpose of making the assignor a witness, the principle adopted in the 398th section, that a witness should not be excluded on the ground of interest, should not be applicable to the case. But this provision was found to be insufficient to meet the evil contemplated by the legislature. Accordingly, in 1851, it was abolished, and, in place of it, a more equitable and effective provision was substituted. Now, the assignor, even though he may have made the assignment with a view to become a witness in an action by his assignee, is not disqualified, but, on the other hand, the other party to the contract or transaction, which is the subject of the action, though himself a party to the suit, may become a witness on his own behalf. Thus, when one party, by means of an assignment, has become legally qualified to become a witness, and the assignee will avail himself of his testimony, the other party to the contract or transaction shall also be heard. *Audi alteram partem* is the

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principle adopted by the legislature. Both parties must be allowed to testify, or neither. Accordingly, and with a view to carry out this principle more effectually, it is provided that when the other party to the contract or transaction is dead, or, for any other reason, his testimony cannot be procured, the assignor himself shall not be examined. From the very nature of the provision, it is apparent that it has reference to cases where the parties to the transaction in controversy are not parties to the action. Accordingly, this restriction upon the right of a party to examine his assignor as a witness is declared to be applicable only to cases where the adverse party to the action appears before the court in a representative capacity. This objection can only be made when it is proposed to examine an assignor as a witness against an assignee, or an executor, or administrator. In these cases, two things must concur. The assignee, executor, or administrator, against whom it is proposed to examine the assignor as a witness, must be able to procure the testimony of the other party to the contract or thing in action in question, and then notice of such intended examination must be given in the manner prescribed. These provisions relate exclusively to cases where the assignor is to be examined against an assignee, executor, or administrator. In these cases, the assignor shall not be admitted, &c., *unless, &c., nor unless, &c.* The grammatical structure of the sentence obviously refers to the provision requiring notice to the same antecedent as the other provision prohibiting the examination of the assignor altogether when the other party to the transaction cannot be examined. Every rule of construction requires that the whole clause should be read together and referred to the same subject matter. That subject matter obviously is, the examination of an assignor against an assignee, executor, or administrator. When that is the case, the party against whom he is to be examined must have the notice prescribed. In other cases, no notice is requisite.

In the case now under consideration, the defendants were one of the contracting parties. The action having been

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brought by an assignee, they were bound to know that the assignor would be a competent witness, and to prepare themselves to meet his testimony without notice of the plaintiff's intention to examine him. In this there is no hardship. Being a party to the transaction, the defendants may be presumed to be acquainted with the case, and there is no greater reason for giving them notice of the examination of the assignor than of any other witness.

The only other point upon which the defendants rely relates to the chattel mortgage. The mortgage had been executed prior to the insurance. It was payable on demand. The mortgagors had covenanted to keep the property insured, and to assign the policy to the mortgagees. Under these circumstances, there can be no doubt that the mortgagors had an insurable interest. There is no evidence that payment had been demanded. If not, the mortgagee's title had not become absolute. But even if it had, the mortgagors would still have had an equity of redemption, which would have been sufficient to constitute an insurable interest. No error appears to have been committed upon the trial, and the judgment must be affirmed.

SUPREME COURT.

TALLMAN AND OTHERS agt. HOLLISTER AND OTHERS.

The provision of § 122 of the Code, that "when, in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment," must be construed to extend only to actions for the recovery of *specific* real or personal property.

Wayne Special Term, July, 1854. Petition of William K Mead and others to be made parties defendants.

The petitioners, in December, 1853, commenced an action against the defendant, Abner W. Hollister, in which an attach-

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ment was issued, under which attachment the share of that defendant in certain real estate, which had descended to him and others, was seized, on or before the 4th of January, 1854. The plaintiffs in the present action recovered a judgment against the same defendant, on or about the 7th of February, 1854. In April following the real estate aforesaid was sold under an order of the surrogate of Cayuga county, to pay the debts of the ancestor from whom it had descended, and after paying the debts a large surplus remains in the hands of the surrogate. The petitioners recovered judgment in their action on the 12th of May, 1854. The present action is in the nature of a creditor's suit under the late chancery system, and is brought, among other things, to reach the share of the judgment debtor in the surplus moneys in the hands of the surrogate.

G. O. RATHBUN, *for petitioners.*

WM. ALLEN, *for plaintiffs.*

T. R. STRONG, Justice. Upon the case, as made by the papers, I am satisfied that the petitioners are entitled, so far as is necessary to pay their judgment, to the share which would belong to Abner W. Hollister, but for the claims of his creditors, of the surplus proceeds of the sale of the real estate; that the lien which they acquired upon the real estate, by the seizure of it under their attachment, continues upon that share of the surplus; but I am of the opinion that they cannot be made parties to this action upon their application. Section 122 of the Code is not applicable to the case; it must be construed to extend only to actions for the recovery of *specific* real or personal property. (Judd agt. Young, 7 *How. Pr. R.* 79.) If the interest of the petitioners in the fund appears by the answer of any of the present defendants, and a defect of parties is insisted upon, on account of the petitioners not being made defendants, the plaintiffs may, perhaps, find it necessary to make them parties; or if their interest appears, and a defect of parties is not set up, the court may, of its own motion, direct them to be brought in; but unless they are thus made parties, they must resort to an action to enforce their rights, making the present

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plaintiffs, and all others interested, parties; or to such other mode of relief as they may be advised is open to them.

The petition must be denied; but I think the petitioners ought not to be charged with costs. They might properly present the question whether they were not entitled to relief under the section referred to of the Code.

SUPREME COURT.

RHOADES agt. WOOLSEY.

An *injunction* was issued by the plaintiff restraining the defendant, his agents or servants from *using, selling, encumbering, or otherwise disposing of a canal-boat*, the defendant being in possession, claiming to own one-third—which third the plaintiff also claimed to own, and for which he had brought his action—the other two-thirds was admitted to be owned by a third person. *Held*, that the defendant was not entitled to have the injunction dissolved, or modified so as to permit him, during the litigation, to use the boat.

Ulster Special Term, July, 1854. Motion on part of the defendant to dissolve injunction. The motion is made upon the complaint, and answer and affidavits.

On the 30th May, 1854, the county judge of Ulster granted an order restraining the defendant, his agents and servants, from using, selling, encumbering, or otherwise disposing of the canal-boat called the *T. F. Barry*, or any of its appendages, until the further order of this court.

The affidavits of the defendant allege, and it is not disputed by the plaintiff, that one Joseph H. Gilles is the owner of two-thirds of the canal-boat. The complaint avers that the plaintiff is the owner of the other third part thereof, such interest having been sold to him by the defendant for the sum of \$266, and he having made payment therefor in full in 1853. The answer puts in issue the plaintiff's ownership of one-third of the boat.

The complaint and affidavits on the part of the plaintiff tend to show that the plaintiff is the owner of one-third of the boat,

Rhoades agt. Woolsey.

and that the defendant being in possession, and pretending to be the sole owner, has offered to sell and dispose of the same to others, and that his pecuniary responsibility is doubtful. They further tend to show that at the time the injunction order was granted by the county judge, and for more than a fortnight prior thereto, the boat was not used in any business, but was laid up, the defendant and crew being engaged in fishing.

L. MAISON, *for plaintiff.*

J. L. CRAFTS, *for defendant.*

WRIGHT, Justice. I do not think that the defendant offers any valid reason for dissolving the injunction, or even for modifying it so as to permit *him* to use and work the boat on his own behalf. If it be true, as averred in his affidavits, that Joseph H. Gilles owns two-thirds of the boat, the defendant has no interest in her, unless it be in the third part claimed to be owned by the plaintiff; and that part it is averred he sold to the plaintiff, and has received payment therefor. If the fact be that the plaintiff is the owner of one-third, and Gilles of the remaining two-thirds of the boat, the defendant, although in possession, has divested himself of all title in the property, and cannot reasonably ask that the injunction should be modified so as to allow him to use and work the boat on his own account, or as an owner in common.

Gilles testifies that he is the owner of two-thirds of the canal-boat in controversy, and by reason of the injunction he is suffering great loss and damage every day, being prevented from using said boat in the ordinary business in which she has heretofore been used. The injunction does not inhibit Gilles from using the boat, nor could any injunction have been obtained against him on the matters set forth in the complaint. If, in fact, he has title to two-thirds of the property, he has the right to use the boat, notwithstanding the injunction. He is part owner with either the plaintiff or defendant, and may work and use the boat, accounting hereafter, if required, for one-third of her net earnings to the plaintiff or defendant, as the ownership of that third shall be found in one or the other of them.

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The injunction sought to be dissolved only restrains the defendant, his agents or servants, from using, selling, encumbering, or otherwise disposing of the boat. I am of the opinion that a case has not been made by the defendant, calling for a dissolution of the injunction order of the county judge, or for a modification of it so as to allow the defendant to use the boat, pending the litigation.

The motion to dissolve the injunction is denied, with \$10 costs of opposing motion, to be paid by defendant to plaintiff.

SUPERIOR COURT.

NICHOLS agt. ROMAINE AND OTHERS.

Where the testator, in his will, directed all the rest, residue, and remainder of his said estate, real and personal, to be divided into five equal shares, one of which he gave to his daughter, Ann Nichols; and in a *codicil* to his will bequeathed to his two grandchildren (children of said Ann Nichols) as follows:—
“Are to be maintained, classically educated, and fully supported out of my estate, in a suitable manner, as if they were my children, until they obtain their several professions; and the expenses and charges for that purpose are not to affect the share and proportion of my estate bequeathed to said Ann Nichols.” *Held*, that the estate charged by the codicil was ascertained, by the nature of the estate given to Ann Nichols, and was, consequently, a charge upon the *real estate*. The *devisees* under the will, therefore, were necessary parties.

Under the Code (§§ 33 and 123) the Superior Court of the city of New-York has jurisdiction, whenever an action involves the determination in *any form of any estate, any right or any interest* in, and to lands in the city of New-York.

An objection, that this court has not jurisdiction because the charge upon the lands is of an equitable character, can not be sustained, where it appears there is a definite interest in the real estate, which can be enforced against the parties by its judgment.

Special Term, May, 1854.—Motion to amend complaint, and an application for an order of publication.

AMBROSE L. JORDAN, *for motion*; WM. C NOYES, *opposed*.

HOFFMAN, Justice. The protracted litigation in this suit, and the difference of opinion which has existed in the court

Nichols *agt.* Romaine and others.

respecting some of the points heretofore raised, and bearing upon every step of the cause, required a careful examination of the present applications.

It has become the law of the case in this court, by a decision at the general term, that the question whether there was an out and out conversion of the real estate into personalty by the will in question can not be determined without the devisees being parties; and again, that it would be improper to decide that the codicil has not effected a charge upon the real estate in favor of the plaintiff without hearing such devisees. The court, if fully convinced, might indeed say that there was no charge, and then the devisees, of course, need not be heard, but not otherwise.

This objection has been substantially raised by S. B. Romaine, an executor, as well as devisee, and Gregory Dillon, an executor and husband of another devisee. It is expressly taken in other answers of defendant's devisees, already before the court. Of course, if it is clear that there is no charge, it is an answer to the present application to bring in others, and this is now insisted upon.

After the decision at general term, the plaintiff applied for an order of publication against one of the devisees, a resident in another state. This motion was denied in March last, but upon a ground which enabled the court to permit it to be renewed.

At the April special term the application was renewed, and upon the additional fact stated, of a release having been executed by the plaintiff of his claim under the will and codicil, to all the real estate situate elsewhere than in the city and county of New-York; and upon a formal entry offered in open court, and to be made in the cause upon the record, to the effect that the plaintiff appeared by his attorney, and freely released from the lien of the bequest or devise in the codicil set forth, all the real estate of the testator therein mentioned situated elsewhere than in the city of New-York, and confined and restricted his claim to such real estate.

Some discussion arising at the hearing of this motion,

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respecting the propriety of amending the complaint, the case was postponed for the purpose of applying on notice for such amendment, and such motion has now been made and argued. Both applications are thus before me.

The two objections which require examination are, first, that there is no charge upon the real estate at all; and next, that if there is, it is not of such a nature as will confer jurisdiction on this court; in other words, that it does not create an estate or interest in real property, within the meaning of the 123d section of the Code. The objection, that it is too late to make a motion to amend, is answered by the history of the case, the decision at the special term, and the comprehensive provision of the Code, (§ 173.)

First. That the bequest given in the codicil operates as a charge upon the real estate seems to me indisputable. The two named grandchildren "are to be maintained, classically educated, and fully supported, out of his estate, in a suitable manner, as if they were his children, until they obtain their several professions." And again, "The expenses and charges for that purpose are not to affect the share and proportion of his estate, in his said will bequeathed to Ann Nichols, the mother of these grandchildren."

By the sixth clause of the will, all his property, real and personal, is to be divided into six equal shares, in the first instance; and he proceeds then to dispose in a special manner of one of such shares. By the seventh clause he directs all the rest, residue and remainder of his said estate, real and personal, to be divided into five equal shares, one of which he gives to his daughter Ann Nichols, above named.

Thus the estate charged by the codicil is ascertained by the nature of the estate given to Ann Nichols, and exempted from its operation; and the estate given is a fifth of the residue of his real and personal property; and the estate in each of the others, and made liable, is a fifth of such residue, of the real and personal property.

The effect of the sixth and seventh clauses of the will, taken together, is, that each of the devisees, or each class of devisees

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narned in the seventh section take a fifth of the actual residue, after payment of debts, and after deducting the dower right, and also one-eighteenth of the whole estate. The one-third part of one-sixth is given in the sixth clause to a son of a deceased daughter, to be paid to him when he attained twenty-one: the interest to be applied to his use in the interim; and if he dies before twenty-one, without lawful surviving issue, it falls into the estate, to be distributed as provided respecting the other parts of his property.

Thus then the devisees named in the seventh clause have among them an absolute estate and interest in seventeen-eighteenth parts of the actual residue, and an expectant estate in the remaining eighteenth; and the son, B. R. Saul, has the interest of that share until he attains twenty-one; has the whole estate in it if he reach that age. His lawful issue, if any, take it should he die before; and in the event of his death within the period, and without issue surviving, the devisees named in the seventh clause take it absolutely.

Therefore, with the exception of the contingency of this son dying before twenty-one, leaving issue, (who of course are now uncertain,) the whole estate (dower, deducted) is vested in definite persons now before the court or sought to be brought before it.

It cannot be supposed that this contingency would prevent a judgment of sale of the property if the charge exists. It could in no way operate further to withhold a sum from immediate payment, proportionate to the contingent interest. It is needless to decide whether this would be necessary.

If this bequest had been given in the will prior to the devise of the residue of the estate, I should suppose that no ingenuity could have raised a doubt as to its being a charge.

From Aubery agt. Middleton, (2 *Eq. Ca. Abr.* 479, p. 16,) down to Merchons agt. Scaife, (*Mylne & Craig*, 896, in 1837,) there is a long series of authorities to sustain it as a charge, and I believe none materially to weaken it. The whole good sense and sound law of the subject is expressed by Lord COTTENHAM in the last cited case: "When a testator speaks of

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the rest and residue of his personal estate, he means what would remain after payment of his debts and legacies. It is natural to suppose that he uses the words in the same sense when applied to his real estate." See also the case of Tracy agt. Tracy, (*Barbour Rep.* 503,) which, although a decision at special term, is in my opinion sound, pertinent, and entitled to much weight.

I do not think that there is any ground for a distinction between these cases and the present, on account of the bequest being made in the codicil after the devise of the residue in the will. On the contrary, when a deviser gives a residue, and subsequently declares that such residue shall be subject to a particular charge, the case is stronger than that of a bequest, and than a devise of a residue. It imports even more clearly a determination to subject the whole residue estate—real as well as personal—to the liability.

The next important question is, whether this court will have jurisdiction after the proposed amendment is made. That will remove the objection arising from a portion of the real estate being out of the city, and leave the point dependent upon the construction of the 33rd and 123rd section of the Code.

Bringing together the clauses in the 33rd and 123rd sections, so far as they relate to the present question, the provision may be thus stated. That the superior court shall have jurisdiction in actions for the recovery of real property, or of an estate, or interest therein, or for the determination in any form of such right or interest, and for injuries to real property, where the cause of action shall have arisen, or the subject of the action shall be situated within those cities respectively.

The present case can not come under the clause, as to the place where the cause of action arose, which was Kings county, where the will was made. It must be brought under the other branch.

The subject of the action is now laid in the city of New-York. It is the sole subject of the action, as the entire insufficiency of the personal estate is averred and admitted.

After carefully considering the provisions in question, it

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appears to me, that the clauses of the 123rd section are disjunctive and separate.

1. That the jurisdiction extends to an action for the recovery of real property owned in fee, by the ordinary action of ejectment, or for its recovery upon the basis of any such estate, or interest therein as would be sufficient to sustain an action of ejectment. Thus the revised statutes (*vol. 2, p. 304, §§ 1, 3*) enact that the action of ejectment may be brought in the cases theretofore accustomed; and no one can recover unless he has a valid subsisting interest in the premises, and a right to recover the same or possession thereof.

What the interest may be, is, I presume, defined by section 10, in connection with subdivision 7, of section 81, viz., an estate in fee, or for life, or the life of another, or for a term of years, stating what term.

But next the jurisdiction is given "for the determination in any form of such right or interest."

It has been said, that this means the determination in any form of a right to recover real property, of an estate therein; in fact, reducing the whole provision to an action of ejectment or dower.

But the meaning I apprehend to be, the determination in any form of right or interest in real estate. The word "such" refers to something antecedent, right, or interest. That antecedent is, "estate or interest therein," that is, in real property.

The word "right" is used as synonymous with "estate," and then the result is, that jurisdiction belongs to this court whenever an action involves the determination in any form of any estate, any right or any interest in and to lands in the city of New-York.

Two examples may be stated:—

If a rent charge upon lands is created, and by grant or by operation of law, a right of distress accompanies it, it is in the nature of a remedy upon the lands. But it is not such a right as will support ejectment, unless a right to enter upon default is expressly given. (*Braithwaite agt. Cooksey, 1 Hy.*

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Black. 465 ; 1 *Rolls*, 671 ; *Jeunette agt. Cowley*, 1 *Sanders* 112. *Hassell agt. Garthwait, Willis* 500.)

A rent charge, then, with a power of distress merely, is certainly not such an estate or interest as can sustain an ejectment. It certainly comprehends the decision of a right or interest in land. The party may reach the fruits of the land, and go upon it. I think the jurisdiction of such a case would belong to this court when the lands are in New-York. And so the settlement of a right of way over the land of another is a determination of a right or interest in land, distinct from a recovery of land, or any estate therein, which may be the subject of ejectment. An action (formerly of assize of nuisance, or on the case) lay for the disturbance of such a right, whether by stopping it, plowing up the land, or damaging the way materially. (*Roscoe on Real Actions*, 365 ; *Law Library*, vol. 29, 12 ; *Wool on Ways*, 66.)

So the decision of a right of common appurtenant may yet be known to the courts, however rare, and this is clearly a right affecting land, but not a right to recover it. (*Coulan agt. Stack* 15, *East*, 108.)

Other cases may be referred to of suits involving the determination of interest totally disconnected from recovery, besides the proceedings under the revised statutes to compel the determination of claims to real estate. Such are a bill in equity *quia timet*, a bill to remove clouds upon the title ; and a bill to settle the use of water among mill-owners. (*Alexander agt. Pendleton*, 8 *Cranch*, 462 ; *Pettitt agt. Shephard*, 5 *Paige*, 493 ; *Bellknap agt. Tremble*, 8 *Paige*, 377.)

The result is, that this court has unquestionable jurisdiction of the case.

Third. But this is a charge upon lands of an equitable character. It could only have been recognized and enforced in a court of chancery.

This fact is far indeed from diminishing the force of the observation submitted. The charge gave an absolute right to the party to sustain a bill for the administration of the whole estate, payment of debts, application of the personalty, and if

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that proved deficient, to have the real estate sold, and all the parties who held the legal title compelled to join in a conveyance to the purchaser. One case to this point is enough. (*Fenhonlet agt. Papaianit*, 1 *Dickens*, 253; *Seaton on Decrees*, 93 and 26.)

Such a demand, armed with such a process to enforce it, is certainly a very definite interest in real property.

It becomes in my view totally unimportant (except when a purchase may raise a question as to parties to a conveyance) whether the executors have a full power to sell and convey or the devisees must sanction it.

When the latter are before the court, a judgment will bind them, even if they are not essential parties to convey a legal title.

I have given much attention to this case because it has been so often before us; and really it strikes me as one exceedingly plain. I do not mean to say any thing as to the amount of the allowance which Judge MASON, as referee, and Judge CAMPBELL at special term, have approved.

The application to amend must be granted as asked.

The order for publication must be applied for after the amendment is made.

Order accordingly.

SUPREME COURT.

COLLINS AND OTHERS agt. CAMPFIELD AND OTHERS.

The act of 1853 (*Sess. Laws 1853*, p. 974) was intended to authorize service of process, &c., when the party to be served *could not be found*, (either in or out of the state,) or being found, should avoid or evade personal service.

Where, upon a statement of the defendant's wife, that he had gone to the state of Ohio, and was not expected back during the summer, except on a visit—*held*, that an order under the act of 1853 for the service of a summons and complaint upon the defendant was irregular.

Besides, there was no necessity of resorting to this mode of service in this case,

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as, the action being for the foreclosure of a mortgage, the service might have been made by publication under the 135th section of the Code.

Albany Special Term, June, 1854.—Motion to set aside service of summons and complaint.

On the 21st of April, 1854, the plaintiffs presented to the county judge of Schenectady an affidavit of a deputy sheriff, stating that the residence of the defendant, George Campfield, was in the village of Scotia, in the county of Schenectady, and that he had made diligent efforts to serve the summons and complaint in this action upon him, and that he could not be found so that such service could be made personally; that, on going to his residence to make such service, he was informed by the wife of the defendant that he was then in Ohio, and that she did not expect him back this summer, except on a visit.

Upon this affidavit an order was made directing that service of the summons and complaint be made by leaving a copy thereof at the residence of the defendant, George Campfield, with some person of proper age, if admittance could be obtained, and such proper person could be found who would receive the same; and, if admittance could not be obtained, or any such proper person could not be found who would receive the same, then by affixing the same to the outer or other door of said residence, and putting another copy, properly folded or enveloped and directed to the defendant at his residence, into the post-office of the village of Scotia, and paying the postage thereon. Pursuant to this order, and on the same day, the summons and complaint were served by leaving a copy at the residence of the defendant, Campfield, with his son, who received the same, and by putting another copy in the post-office, as directed by the order.

The defendant, Campfield, moved to set aside the service of the summons and complaint, upon the ground that the order of the county judge was unauthorized and void.

BARNARD and PARSONS, *for plaintiffs.*

C. B. COCHRAN, *for defendants.*

HARRIS, Justice. The act of 1853 (*Sess. Laws, 1853, p. 974*)

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was intended to authorize the mode of service which has been adopted in this case, when the party to be served *could not be found*, or being found, should avoid or evade personal service. Neither is shown to be true in this case. It is not pretended that the defendant, Campfield, had avoided or evaded personal service of process, nor was it shown that he could not be found. The ground upon which the application for the order was founded was, that, though a resident, the defendant was absent, so that he could not be personally served with process. The officer employed to make the service was informed where he was; and the only obstacle in the way of a personal service was, that he was out of this state. Such a case is not within the terms or intent of the act of 1853.

Nor had the plaintiffs any occasion to resort to this extraordinary mode of service. If it be true, as was stated upon the argument, that the action is brought to foreclose a mortgage; the plaintiffs, upon showing that the defendant could not, after due diligence, be found within this state, might have had an order that service be made by publication in the manner prescribed by the 135th section of the Code. Whether the defendant was a resident or not, the case would have been within the 4th sub-division of that section.

It was insisted by the defendant's counsel that the case was also within the *third* sub-division of the 135th section. But I am not prepared to say that the plaintiffs could have had an order for publication merely on the ground that the defendant was a non-resident. His family reside in this state, and the only evidence to show that the defendant himself was a non-resident is, the statement of his wife, that he was in Ohio and was not expected back this summer, except on a visit. It is true, that a man may have his domicil in this state, and yet not be a resident. To constitute such a man a non-resident, however, something more than a transient visit to some other state or country is required. He must have determined to make some place without the state his place of abode, at least temporarily. This is clearly the doctrine of the court in *Frost agt. Brisbin*, (19 *Wend.* 11; see also *Haggart agt. Morgan*, 1 *Sel-*

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den, 422.) In the latter case the debtor had been absent three years and a half, and proof was offered to show that this absence was necessary to accomplish the business in which he was engaged. Although New-York was his domicile, it was held that he was a *non-resident*. So in Frost agt. Brisbin, above cited, the defendant had engaged in mercantile business at Milwaukee, with intent to make it his permanent residence if his business should prove successful. It was held that, though his *domicil* was yet in this state, he had become a non-resident. The mere fact that the defendant in this case has gone to Ohio, and is not expected to return this summer, except upon a visit, is scarcely sufficient to bring the case within the doctrine of the cases cited.

But, it being an action to foreclose a mortgage, it is immaterial whether the defendant is a non-resident or not. If, after due diligence, the plaintiffs have been unable to procure personal service of process, they are entitled to an order allowing them to make service by publication. And, if this were not so, the act of 1853 has not made provision for such a case. Before the substituted service provided by that act can be resorted to, it must be shown that the defendant cannot be found, *either in or out of the state*, or that he avoids or evades personal service.

This motion must, therefore, be granted with costs.

SUPREME COURT.

WILLIAMS AND OTHERS agt. RICHMOND.

An admission in one defence in an answer to a complaint on a promissory note that the defendant endorsed a note similar in amount and description to that mentioned in the complaint, accompanied with a denial of all knowledge or information sufficient to form a belief that he endorsed the same to the plaintiffs, or that the plaintiffs are the owners or holders thereof, "as stated in the complaint in this action," will, upon a motion for judgment on the ground that the answer is frivolous, be construed to relate to the note described in the complaint.

Williams and others agt. Richmond.

References in a subsequent defence in the same answer to the "said" note sufficiently point to the note in suit.

At Chambers, August 8, 1854. Motion for judgment on the ground that the answer is frivolous.

F. E. CORNWELL, *for plaintiffs.*

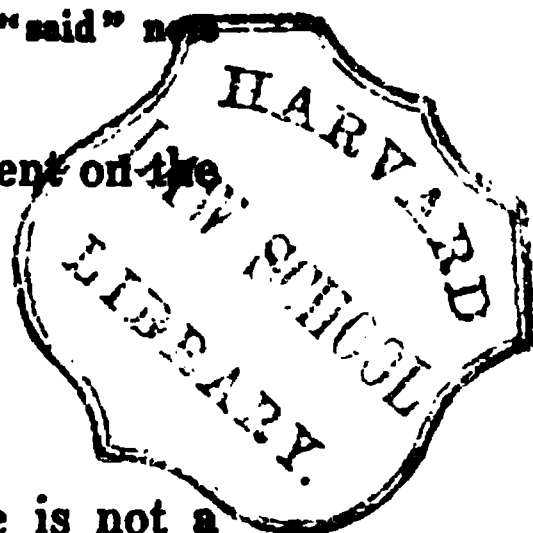
WM. VAN METER, *for defendant.*

T. R. STRONG, Justice. The answer in this case is not a lawyer-like pleading, but construing it liberally with a view to substantial justice between the parties, as § 159 of the Code requires, I think it is not frivolous.

The defendant in the first branch of the answer, containing what is set forth as the first defence, in terms admits that he endorsed a note similar in amount and description to that mentioned in the complaint; and then denies all knowledge or information sufficient to form a belief that he endorsed the same to the plaintiffs, or that the plaintiffs are the owners or holders thereof, "*as stated in the complaint in this action.*" By this reference to the complaint, the defendant treats the allegations therein as applicable to the note which he admits he endorsed, and his admissions must therefore be understood to relate to the note described in the complaint. In this view, this part of the answer contains in substance an admission of the endorsement of the note upon which the defendant is sued, with the denials named.

Regarding the note referred to in the commencement of the answer as identical with that described in the complaint, the references in the subsequent parts of the answer, which are presented in form as a second defence to the "said" note, sufficiently point to the note in suit; and if so, the denial in the second defence of the allegation in the complaint, that defendant "by writing endorsed on the said note waived demand of payment of the said note," &c., forms a material issue.

There being at least one material issue, the motion must be denied.



Davidson agt. Miner.

SUPREME COURT.

DAVIDSON agt. MINER.

Where the assignee, in consideration of the assignment of a claim, agreed with the assignor that when he collected it he would pay the assignor fifty dollars. In an action by the assignee for the recovery of the claim—*held*, that the assignor was a *competent witness* for the assignee. (*See Allen agt. Franklin Insurance Co.*, ante, p. 501 to the same point.)

Ulster Special Term, April, 1854. Motion for new trial. The action was brought to recover money alleged to have been received by the defendant as the guardian of one Hiram Davis. Davis had assigned the demand to the plaintiff. When the assignment was executed, the plaintiff made and delivered to Davis his note as the consideration of the assignment, which note is as follows: "I hereby agree and promise to pay Hiram Davis fifty dollars for a claim against Edwin Miner I have this day bought of him when I collect the same. Dated August 31, 1853. Harvey F. Davidson."

Upon the trial, the plaintiff offered Davis as a witness. He was objected to, and excluded on the ground that the action was prosecuted for his immediate benefit. No other evidence having been offered, the plaintiff was non-suited. The plaintiff moved for a new trial on the ground that the witness Davis was competent and ought not to have been excluded.

W. MURRAY, Jr., *for plaintiff.*

W. YEOMANS, Jr., *for defendant.*

HARRIS, Justice. Davis clearly had a direct interest in the event of the suit. He had sold the cause of action for which the suit was brought to the plaintiff, and had agreed that the payment of the price should depend upon the plaintiff's success in collecting the demand. If the plaintiff never collected anything, he never would be liable to pay Davis anything. When he should succeed in collecting the demand, then, and not till then, would Davis have a right of action against him for the \$50 which he had agreed to pay as the consideration of the sale. A clearer case of disqualifying interest at common law could

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scarcely be put. The witness had agreed that his right of action against the plaintiff should depend upon the plaintiff's success in this suit. The witness must inevitably gain or lose by the result of the trial in which he is called to testify.

But the Code has declared that no witness shall be excluded on account of his interest in the event of the suit. To sustain the ruling at the trial, it must appear that it is in fact *his suit*, in which he is called to testify. Of this there is no evidence. It is the plaintiff's suit. He holds the demand upon which the action is brought by a valid transfer. He alone has the right to take the conduct of the suit, and, if successful, receive the fruits of it. He alone, if unsuccessful, is liable for the costs. In no proper sense of the term can it be said that the suit is prosecuted for the benefit of Davis. All that can be said is, that if the plaintiff recovers the demand in suit, he will owe the witness \$50; if he does not, he will owe him nothing. Thus, the witness has an interest in *the event* of the suit, but has no interest in the suit itself. He cannot discharge the cause of action. He cannot receive the recovery, if it should be had. It is not prosecuted for his immediate benefit. It was error, therefore, to reject Davis as a witness, and a new trial must be granted.

SUPREME COURT.

HILL AND OTHERS agt. NORTHPROP.

GRAHAM agt. NORTHPROP.

A judgment upon a written offer of the defendant under § 385 of the Code, although within the terms, is not within the spirit of § 278, and may be entered without the direction of a judge of the court.

That mode of obtaining judgment may be pursued in all cases where the parties choose to resort to it.

A debtor may give a preference to a creditor, although he has agreed with another creditor not to do so, and for that purpose may embrace in a single note, payable immediately, debts due and to become due, and liabilities for him, and allow a judgment to be taken against him for the amount of the new note. A judgment should not be set aside on motion as fraudulent, except in a clear case, one free from any reasonable doubt.

Hill and others agt. Northrop.

Wayne Special Term, July, 1854. Motion on the part of the plaintiffs in the case first entitled, to set aside the judgment and execution in the case last entitled, as against the plaintiffs in the first case.

E. H. AVERY, *Counsel for the plaintiffs in the 1st case.*

C. MORGAN, *Counsel for the plaintiff in the 2nd case.*

T. R. STRONG, Justice. A judgment upon a written offer of the defendant under § 385 of the Code is within the language of § 278, which prescribes that a judgment in the cases therein specified "shall, in the first instance, be entered upon the direction of a single judge," but it is manifest that the latter section was not intended to apply to such a judgment. By section 385 it is provided, that upon filing the offer with the papers, "the clerk must thereupon enter judgment accordingly." It is imperative upon the clerk to enter judgment; no direction of a judge is contemplated; and the former section must be held not to extend to that case. But if it were otherwise, the omission to obtain the direction of a judge would be an irregularity merely, of which the defendant only could take advantage.

There is nothing in § 385 limiting it to cases of disputed or unsettled demands, or indicating an intention that it should be thus restricted in its operation. I do not perceive in other parts of the Code any clear evidence of such an intention; nor do I see that any mischief would result from applying it to all cases to which its language is applicable. I think that mode of obtaining judgment may be pursued in all cases where the parties choose to resort to it.

The principal and only remaining question upon this motion is, whether the judgment in the last case is fraudulent as against the creditors of the defendant. The defendant had a right to give a preference to the plaintiff in that case, although he may have agreed with another creditor not to do so; and for that purpose to embrace in a single note, payable immediately, debts due from him to the plaintiff and to become due, and liabilities of the plaintiff for him, and to allow a judgment

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to be taken against him for the amount of the new note. It does not appear that the new note, or the judgment sought to be set aside, is for an amount exceeding such indebtedness and liabilities, and whether the judgment is fraudulent, or not, must depend upon whether there was an arrangement or understanding between the parties to it that it was to be used to hinder delay or defraud the defendant's creditors. The defendant, in his affidavit upon which the motion is in part founded, swears that there was such an arrangement and understanding, that the note and judgment thereupon were given for the purpose of preventing a forced sale and sacrifice of the defendant's property, and with the previous understanding and agreement that the plaintiff would aid and assist the defendant in preventing such forced sale and sacrifice; that it was the principal object of the defendant, and so, well understood and agreed, to prevent the defendant's creditors from forcing a sale and sacrifice of the defendant's property, and in order thereby to secure the means of effecting more easily a compromise with the creditors of the defendant for the benefit of the defendant.

This affidavit presents a strong case of fraud, and if there was nothing more on the motion, I should not hesitate to set aside the judgment as against the defendant's creditors. But the plaintiff in the last judgment has made two affidavits, in one of which he swears that there was no "attempt" on the part of the plaintiff or defendant, in taking the new note, or perfecting the judgment, to "injure, defraud, or delay" the creditors of the defendant; and in the other of which he swears, that the only object in obtaining the note and judgment was to secure the sum for which the defendant was indebted to him, and that it was so understood and expressed between him and the defendant. And annexed to the first affidavit of the plaintiff is an affidavit of the *defendant*, verifying the truth of the plaintiff's affidavit. It is clear that the plaintiff's affidavits do not meet the first named affidavit of the defendant; they leave unanswered, except in a general and vague manner, the specific allegations in respect to fraud. But the defendant's affidavit last referred to, in conflict with his other affidavit, although he attempts to

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explain the same, much impairs his credit, and, in connection with the affidavits of the plaintiff, throws so much doubt upon the case as presented by the first named affidavit of the defendant in regard to the question of fraud, that the court cannot properly, upon this motion, relieve the moving parties against the judgment as fraudulent. In order to warrant such relief on motion, a strong case should be established, one free from any reasonable doubt. The moving parties must be left to their remedy by action.

The motion must be denied, without prejudice to an action for relief, and without costs to either party.

SUPREME COURT.

ELWOOD agt. SMITH.

To sustain an action for the wrongful detaining of personal property, and for delivery thereof, it must appear that, at the time of the commencement of the action, the defendant had such control over the property, that he might have delivered the possession to the plaintiff.

A wrongful withholding implies a power to deliver.

Ulster Special Term, April, 1854.—Motion for a new trial.

The complaint alleged that the defendant had become possessed of, and wrongfully detained from the plaintiff twelve tons of hay, the property of the plaintiff, and demanded that the defendant might be adjudged to deliver it up to the plaintiff. The defendant denied the allegations in the complaint.

Upon the trial the plaintiff gave in evidence a chattel mortgage executed by one Hawk, bearing date the 31st of May, 1853. Among the items of property included in the mortgage was the following: "About twelve acres of grass now growing in the meadow, all well fenced and secured in three different pieces." It was also proved that the grass had been cut and put in a barn upon the farm occupied by the mortgagor. On the 3d of October, 1853, a deputy of the sheriff of Delaware sold the hay by virtue of an execution against Hawk in favor

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of the defendant, reserving to Hawk enough to winter a cow and ten sheep. The defendant bid it off. The hay was not weighed or separated from that reserved. It was all in one mow. The plaintiff proved that after the sale he forbade the defendant to remove the hay, and that he replied he had bought it, and he should take it away. It was also proved that after the sale Hawk nailed up the barn which contained the hay.

The plaintiff having rested, the defendant moved for a nonsuit, on the ground that the property was not, at the commencement of this action, either actually or constructively, or legally in the possession of the defendant, having been sold while mixed with other hay, and not separated by the officer at the time of the sale, or delivered to the defendant, or taken by him. The court granted the motion, and the plaintiff moved to set aside the nonsuit.

W. YEOMANS, jr., *for plaintiff.*

W. MURRAY, jr., *for defendant.*

HARRIS, JUSTICE. To sustain an action like this, the plaintiff must not only show that he is lawfully entitled to the possession of the property in question, but that the defendant unlawfully withholds it. The latter fact can only be established when it appears that, at the commencement of the action, the defendant had such control over the property that he might, if he would, have delivered the possession to the plaintiff. A wrongful withholding implies a power to deliver. If the defendant could not have delivered the property to the plaintiff he ought not to be punished for not doing it. In this case the defendant had bid off the property at the sheriff's sale, and had declared that it was his intention to remove it. But he had not done so. He had not assumed to exercise any control or dominion over the property. If the plaintiff had a right to the possession under his mortgage, there was no one to prevent his taking it. This action was unnecessary. The nonsuit was, therefore, properly granted, and the motion for a new trial must be denied.

Tracy agt. Talmage, President, &c.

SUPREME COURT.

TRACY agt. TALMAGE, PRESIDENT OF THE NORTH AMERICAN
TRUST AND BANKING COMPANY.

Free banks have authority to buy, at discount, bonds, notes, or any evidences of the public debt of a state.

They are not forbidden from giving their engagements on time, provided such engagements are not adapted or intended to circulate as money.

They are not bodies corporate within the meaning of the Constitution, or the General Banking Law.

Nor are they subject to penal regulations involving forfeiture or imprisonment, enacted in reference to corporations proper.

New-York General Term, Sept. 1854.

Present, MITCHELL, P. J., ROOSEVELT and CLERKE, Justices.

The facts in this case are all stated in the opinion of the court.

DANIEL LORD, *for plaintiff.*

WM. CURTIS NOYES, *for receiver.*

By the Court—ROOSEVELT, Justice. Among the claims presented for liquidation to the receiver of the late North American Trust and Banking Company, was one on behalf of the state of Indiana for \$175,000, in the form of eighteen certificates of deposit of the denominations of nine and ten thousand dollars each, dated Jan. 2, 1841, and payable, with interest, at periods varying from five to twenty-two months after date. These certificates, it appears, were renewals of others previously given, and those again traced their origin to a written agreement of the 18th of January, 1839, between the Trust Company, a free bank formed under the general law, on the one part, and the Morris Canal Company (acting, according to the testimony, as agents for the state of Indiana) on the other. It was an agreement on the one part, without reference to any particular purpose, to sell twelve hundred "Bonds of the State of Indiana," and on the other to give in payment the "negotiable obligations" of the Trust Company, payable, not on demand, but on

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time, with interest—the lowest denomination of which (the highest being \$150,000) need not, by the terms of the agreement, have been less than \$24,750. Such an agreement, says the receiver, was an unlawful dealing by a corporation in public stocks, and an unlawful issuing by a corporation of a prohibited species of bank notes; and that no rights, therefore, cognizable by a court of justice, can accrue from it.

To understand the point of the receiver's objection to the claim, and of the answer to it, a brief recurrence to certain matters of public history is necessary. For many years prior to 1838 the business of banking in this state was a chartered monopoly, made so by various express statutory provisions, denominated, collectively, "The Restraining Act." This act, under severe penalties, prohibited almost every branch of banking to any person, company, or partnership, not specially authorized by corporate charters, doled out from time to time by successive legislatures to successive political or personal favorites. The granting of these charters, as may readily be conceived, in time became a great abuse, so much so that the convention which was called, in 1821, to revise the state government, inserted in the then new constitution a provision requiring, thereafter, "the assent of two-thirds of the members elected to each branch of the legislature to every bill creating any body politic or corporate."

Favoritism, nevertheless, fortified as it was by the restraining act, still continued, with its attendant corruption, until public dissatisfaction became so strong and so universal that the legislature were at length compelled to extirpate the root of the evil. Accordingly, on the 4th of February, 1837, so much of the restraining act "as prohibited a person, or association of persons, not incorporated, from keeping offices for the purpose of receiving deposits or discounting notes or bills," was repealed. And on the 18th of April, in the following year, the whole system was remodelled, and the business thrown open to general competition by the passage of a law entitled, "An Act to authorize (instead of restraining) the business of Banking."

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Under this act, on the 18th of July, 1838, twenty individuals, invited by the liberal character of its provisions, formed themselves into an association, or partnership, for which they assumed the name or style of "The North American Trust and Banking Company." The association, thus formed, construing the act which authorized their formation as expressly intended not to perpetuate, but to abolish the principle of corporate monopoly, and to restore in a great degree the natural system of free banking, (it was popularly called, "The Free Banking Law,") in January, 1839, as clearly stated, entered into a written contract with the agents of the state of Indiana. as any other company of individuals might have done, for the purchase, from them, on credit, of \$1,200,000 of state bonds, which, immediately after, were delivered to, received by, and appropriated to the use of the company, and the whole purchase money, from time to time, as it fell due, regularly paid, except a balance, still outstanding, of about \$175,000. This balance, in any form or to any extent, the receiver now refuses to recognize; insisting that the contract, out of which it arises, being, as he contends, prohibited by law, the association, as a consequence, were under no obligation either to pay for or return the bonds of the state, or to account for any portion of their avails.

The whole case, it will be seen, on the part of the receiver, (and here it seems to me is the error,) rests upon the assumption that whatever the legislature may have called these partnerships, or whatever may have been the legislative intention as to their character and denomination, yet, being in reality corporations, they are, and must be, *volens volens*, subject to all existing prohibitory enactments, whether constitutional or merely legislative, affecting that kind of legal existences.

Now, whether the free banks are corporations or quasi corporations, or only associations possessed, like limited partnerships, of certain corporate attributes, is to my mind, for the purposes of the present argument, quite immaterial. The only question is, (all constitutional difficulties having been disposed

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of,) did the legislature, in forming them, or rather, in authorizing their self-formation, intend that certain penal provisions of law, previously enacted to govern the action of chartered banks—(undisputed corporations)—should apply to these new forms of limited partnership; and is that intention, if entertained by the law-making power, expressed in a manner so clear as to require no implication or interpretation to discover it; the rule being inflexible, and as just as it is inflexible, that penal enactments, when not perfectly clear, admit of no extension by judicial inference.

To me it seems obvious, as well from the wording of the free banking law, as from the whole history of its origin, progress, and final passage, that no such intention was entertained by the legislature, and for the reason, mainly, that they wished, as was indispensable, to avoid any application of the provisions of the then Constitution, which precluded, according to the universal understanding at the time, the creation or authorization of corporate bodies by any general law. (See Assembly Documents of 1838, No. 122, and the case of Beers and Warner, 22 *Wendell*, 108.) They accordingly, with an almost hypercritical caution, whenever speaking of the contemplated partnerships, denominated them “associations of persons,” and in their organization, made none of the usual provisions for “directors;” allowed no suits or conveyances except by, to, or against the president for the time being, and by his natural or individual name; superseded the old-fashioned term stockholders by that of shareholders; and instead of assuming that all or any of the existing regulations in regard to corporate bodies, would of necessity apply to the new associations, selected from among these regulations a few deemed suitable and proper, and expressly declared that those so selected—(thus clearly rejecting all others)—should be binding upon these associations, “in the same manner as upon any (not any other) monied corporation;” and in a whole series, from year to year, of subsequent statutes, uniformly spoke of “incorporated banking institutions within this state,”—(see particular act of May 7, 1839)—as distinguished and different from, and not synonymous

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with, "associations authorized to carry on the business of banking by virtue of the act of April 18, 1838."

What right, then, for the purpose of applying, not constitutional restrictions, but legislative penal enactments, have the judiciary to say, not merely that these "associations" are, but that they shall be deemed "bodies corporate," when the legislature have said—and said clearly and repeatedly, by the most unavoidable implication—that they shall not.

True, it is not competent to the legislature to compel a judge, as has been said, to make a thing white which in its nature is black; but it is competent to that department of the government to declare, and the judiciary will be bound by the declaration, that even a negro, black as an original Hottentot, shall, in the eye of the law, be deemed to be and have all the rights and privileges of the whitest specimen of the Circassian race. It is a mere question in that respect of legislative intention. The legislature, even as against undisputed corporations, had a perfect right to repeal absolutely any or all of these penal laws, and, of course, as against the new "associations," to declare that, unless where specially applied, they should not be applicable. This, in effect, they have done, by declaring, in terms of the most pointed implication, that the free banking associations were not, and in no event should be deemed to be "bodies corporate or politic," but banking partnerships, with all the rights of natural persons, except as to issuing bills or notes to be put in circulation as money, and upon their compliance with the directions prescribed by the act, with only a limited liability for partnership debts. The late supreme court, notwithstanding the clear and undoubted evidences of the legislative intention, in two cases, soon after the passage of the Free Banking law, held, as in that view, and that view only, they had a right to hold that these associations, in spite of legislative definition to the contrary, were in fact bodies corporate, within the prohibition of the constitution.

In the court of errors, however, on appeal to the higher jurisdiction of that tribunal, and after the most elaborate discussion, an opposite conclusion was subsequently arrived at, as distinctly

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expressed in a specific resolution (*see 23rd Wendell*) adopted 22 to 3, declaring "that the associations organized (under the general law) are not bodies politic or corporate within the spirit and meaning of the constitution."

The general banking law, under which the free banks are established, contains no provision expressly allowing, or expressly prohibiting, by that particular designation, the purchase of "state bonds." Fourteen of its sections are devoted entirely to securing the community, by proper safeguards, from losses which might arise, as they had too often arisen, out of a vicious paper currency—the remaining eighteen almost entirely to the removal of the then existing and much-complained of monopoly character of the previous New-York banking system, which, while it corrupted the legislature, denied to the great mass of people the exercise of their just and natural rights. By the first sections, notes intended for circulation as money were to be engraved under the direction of the comptroller, and countersigned in his office with a uniform signature, and secured by a deposit, with him, of public stocks, or of mortgages on real estate. By the other sections, the restraining act was to a great extent repealed, and the limited partnership act, in effect, enlarged; giving to the members of the new "associations," upon complying with the prescribed conditions, not only exemption from any liability beyond their share of the common stock, but also the faculty of transmitting such share, with its attendant responsibilities, to others, without involving a dissolution of the firm.

Contrary to the previous restricted policy, any person might now "establish offices of discount, deposit and circulation," and "associate," or, in other words, form partnership for that purpose—such associations to have "power to carry on the business of banking," and the "incidental powers" necessary for the management of such business. Under this act, and not under any charter of incorporation, the North American Trust and Banking Company was organized. It was authorized, among other things, therefore—for such are the terms of the act—"to discount," not only bills and notes, but "other evi-

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dences of debt," without restriction, and to loan money on any kind of security, "real" or "personal." Now, "to discount" includes "to buy;" for discounting, in most cases, is but another term for "buying at a discount." (*See Richardson's Dictionary.*) And what is a bill? *Jacobs*, in his *Law Dictionary*, defines a bill to be a "common engagement for money given by one man to another; being sometimes with a penalty, called a penal bill, and sometimes without a penalty, then called a single bill, though the latter is most frequently used. By a bill," says he, "we ordinarily understand a single bond, without a condition." Consequently the company, under the power of "discounting bills," were authorized to buy bonds, especially single bonds; which (if we may assume as proof, matter of public notoriety) is the precise form of these state securities. They are simple acknowledgments of indebtedness and promises or engagements to pay, with interest, at a future specified period. They are seldom, even, under seal, although a "bond under seal" without a condition is none the less a note or bill, being denominated in law a "sealed note," or "single bill." The sealed notes in question are made, it is true, by a state, and not by an individual. But the act does not limit these associations to the purchase of the notes of individuals. The power granted by it is general, and without restriction, to discount any bills or notes.

Had the company, under this power, discounted a bond of the city of New-York, no one, I presume, would have doubted the legality of the act, and wherein, so far as the present point is concerned, do state bonds differ from city bonds? Should it be said that these state engagements are payable at a remote day, we may ask, is a written monied obligation less a bill, or note, if payable in twenty years, than if payable in twenty days? Or—for that is all we are required to establish—is the instrument less an "evidence of debt" when made by a state, and payable with interest at a long, than when made by an individual, or ordinary corporation, and payable at a short period? That the general power to purchase bills, notes, and other evidences of debt, carried with it incidentally, if not

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directly, the authority to purchase state bonds, and that it was so understood by the legislature, is further obvious from the second section of the act, which provides, as originally passed, that whenever any person, or association of persons formed for the purpose of banking under the provisions of this act, shall legally transfer to the comptroller any portion of the public debt now created, or hereafter to be created, by the United States, or by this state, or such other states as shall be approved by the comptroller, such person or association of persons shall be entitled to receive from the comptroller an equal amount of circulating notes, &c.

Now, how, we may inquire, were those associations to transfer, if they could not buy any "public debt?" And where, in the act, is the authority to buy, unless it be contained in the words "power to carry on the business of banking, by discounting bills, notes, or other evidences of debt, or loaning money," or in the words "incidental powers necessary to carry on such business?" If the grant be not embraced in these words, it is nowhere. And yet, as will be seen, the legislature assumes (and such a definition is conclusive) that a grant of power to purchase "public debt," as well as private, is contained in the act; and as a consequence, by necessary implication, declares that the provision either was intended to give, and did give, the power so to do, or, more properly speaking, was intended to recognize, and did recognize, the natural right of associations, as well as individuals, to purchase and hold that class of obligations, as well as any other "bills, notes, and evidences of debt."

Thus do the terms, purchasing "evidences of debt," unrestricted, not only in their own nature impart the right to deal in the public debt of a state, but they are expressly assumed so to mean by the very legislature which used them, and in the very statute in which they were used. It may be that the grant was impolitic; but it is the office of the judiciary, in the language of the court of appeals, (2 *Selden*, 12,) "to administer the law as the legislature has declared it; not to alter the law by means of construction, in order to remedy an evil or incon-

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venience (sometimes only imaginary) resulting from a fair interpretation of the law." Under the monopoly and restrictive system of restraining acts and chartered banks, as existing prior to 1838, it was usual, I admit, to prohibit these institutions from buying and selling state stocks. These special prohibitions, however, are only an additional evidence that, without them, under the general authority to bank, would have been included the power to buy and sell such stocks.

But it is sufficient to know that one object of the free banking law was to remove, not to increase restrictions; to overturn, and not to re-establish the chartered system. So strong, as already stated, had the public sentiment on this subject become, that as early as February, 1837, a year before the passage of the general banking law, the legislature were compelled to repeal all that portion of the revised statutes which prohibited individuals, "or associations of persons not incorporated," from keeping offices of discount and deposit. The general act, therefore, of 1838, in this respect, did but recognize and enlarge the restoration of the natural rights of the citizen established the year previous.

Again, the bonds or bills in this case, all or most of them, were payable in London. They were, in effect, if not in form, in the nature of exchange drawn by the state of Indiana on their bankers in England; and may fairly, therefore, without undue straining of language, in the absence of any express prohibition, be included in the power, expressly granted, of "buying and selling foreign coins and bills of exchange." They were engagements by the state to deliver so many pounds sterling in London, at the periods specified, in consideration of a certain number of dollars to be paid at certain other periods in New-York, by the banking company. At all events, it is conceded, and could not be denied, that the company had power to buy this class of "evidences of debt," for the purpose of depositing them with the comptroller. And the case shows conclusively, that neither the state itself nor the agents of the state had any notice or suspicion that the purchase was for any other object, or for any object whatever prohibited by law.

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The courts of a state of the Union will not presume that the legislature of another state of the same Union intended to violate its laws, or to authorize any of its agents to do so.

The legislature, therefore, of Indiana must be taken to have authorized a lawful, and not an unlawful disposition of its bonds; and if the transfer in question (as we think we have shown it was not) was unlawful, it was not authorized by the state, and of consequence was of no effect to pass the title, and the state may now claim the restoration of the securities, or, in default of such restoration of the specific bonds, full payment of their value. So that whether the purchase was lawful or unlawful, the result substantially must be the same; and the court, "in furtherance of justice, would be bound, under the Code, to allow any amendment of the proceedings which might be necessary to adapt them to either view of the claimants' remedy. And this consideration, too, were there no other, furnishes a complete answer to the receiver's second objection, which goes to the form of the subsequently delivered evidences of the company's engagement to pay, and not to the engagement itself. For if these evidences, as interfering with the currency, were unlawful, the agents of the state of Indiana had no authority to receive them in fulfilment of the contract, and the act in that case did not bind their principals.

Second. But were "the negotiable obligations" of this "association of persons," as the law denominates them, payable on time, void by any statute on the subject existing in 1839, when the contract in question was made? By that contract which bears date the 18th of January, 1839, and covers the entire transaction of twelve hundred thousand dollars, two of the obligations to be given by the banking company were to be for \$100,000, four for \$150,000, eleven for \$36,863.33 1-2, each, and one for \$24,750—denominations of bills, it would seem, not very likely to enter into the currency, or to admit of any very striking "similitude to bank notes." Be this as it may, however, there was no statute, as I have shown in the case of the Palmers, lately decided by this court, prohibiting the giving of such obligations by the free banks prior to that

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of May, 1840 ; and even that statute, as appears from its legislative history, although expressly including associations, was only intended to apply to "notes and bills issued or put in circulation as money." Admitting, however, that it comprehended "obligations" such as the present, its very enactment was an admission that no such prohibition previously existed. Else why did it declare, in the form and with the title of amendment, that "no banking association," (after the 4th of June, 1840, for that is its legal effect,) "or individual banker, as such, should issue, or put in circulation, any bill or note of said association, or individual banker, unless the same should be made payable on demand and without interest." If such was the law already, why declare it over again, and why call the act an amending act? Or, if its previous existence was so doubtful as to require and receive a more explicit declaration of the legislative will, what justice is there, the provision being penal, in exacting on the part of strangers a previous knowledge of its requirements on pain of forfeiture, fine, and imprisonment?

These obligations, however, (that is, for the \$175,000 remaining unpaid,) although given before, were renewed, it is said, after the act of 1840, and were renewed in a form, being for nine and ten thousand dollars each, somewhat modified, so far as respects amounts, from that originally stipulated; although even those sums, it is obvious, are altogether too large to admit the idea of a currency. Assuming, however, that the renewed certificates, whatever their denominations, are within the act—a proposition, I imagine, which the district attorney would find it not very easy to establish on a criminal trial—they are, in that case, simply void, and leave the original obligations standing in full force.

My conclusion, therefore, is, for the reasons above stated, and others discussed by me more at length in deciding the case of the Palmers, that the state of Indiana, in some one if not in all aspects of the transaction, is entitled to recover, and that a decree ought to be entered accordingly.

Lapeous agt. Hart.

SUPREME COURT.

LAPEOUS agt. HART.

In an action of tort, after verdict, where the defendant obtains an *order staying* proceedings for the purpose of making a case, it does not stay the plaintiff from procuring an *order of arrest*.

Where it appears from the affidavit upon which an order of arrest is granted that the action is brought to recover damages for an injury to the person of the plaintiff, it is sufficient to give the judge jurisdiction. It is then a matter of discretion whether the order should be granted or not, which will not be reviewed on motion to vacate it.

Albany Special Term, June, 1854. Motion to set aside order of arrest. The action was for assault and battery. It was tried at the March circuit in Albany, and the plaintiff recovered a verdict for \$500. When the verdict was rendered, the defendant obtained an order allowing him thirty days to make a case, &c., and directing that all the proceedings on the part of the plaintiff be stayed in the mean time. This order was made on the 24th of March. On the 5th of April following the plaintiff applied to one of the justices of this court, upon an affidavit showing these facts, for an order of arrest, alleging that the defendant was about removing beyond the jurisdiction of the court. The order was made, and the defendant was held to bail in the sum of \$650. The defendant moved to vacate the order, first, upon the ground that it was obtained in violation of the order staying the plaintiff's proceedings; and, second, because the affidavit upon which it was obtained was insufficient.

L. TREMAIN, *for plaintiff*.

J. H. REYNOLDS, *for defendant*.

HARRIS, Justice. The defendant is mistaken in supposing that the order to stay proceedings in the action prohibited the plaintiff from obtaining an order of arrest. Such an order has reference to the *ordinary* proceedings in the action only. The plaintiff, while the stay of proceedings remained operative, could not perfect his judgment, but he might institute proceed-

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ings to have the order itself vacated. So, too, while he might not proceed to obtain the relief for which the action is brought, he might proceed to obtain any temporary relief to which he may be entitled. The application for the order of arrest, therefore, was not a violation of the order staying the plaintiff's proceedings.

Nor can the motion prevail upon the other ground. It appeared by the affidavit, upon which the order of arrest was granted, that the action was brought to recover damages for an injury to the person of the plaintiff. This was enough to give the judge jurisdiction. It then became a matter of discretion whether or not the order should be allowed. The manner in which that discretion has been exercised is not the subject of review upon a motion to vacate the order. The motion must, therefore, be denied with costs.

SUPREME COURT.

BURR agt. WRIGHT.

A plaintiff can not *demur* to one defence in an answer, which is inconsistent with his *reply* denying other defences.

New-York Special Term, September, 1854. In this case the plaintiff both replied and demurred to the defendant's answer, and the defendant moved that the plaintiff elect whether he would abide by his reply or demurrer.

A. W. CLASON, Jr., *for motion.*

C. BAINBRIDGE SMITH, *opposed.*

MITCHELL, Justice. This motion is founded on the supposition that one of the pleas is inconsistent with the other, because, as is supposed, the demurrer is to the same matter which the reply covers. From the manner in which the answer is expressed, it makes a distinct cause of defence, that the assignment to the plaintiff was made to defraud creditors; and to

Wies and wife agt. Fanning.

that the plaintiff demurs, and to that only. It also makes, as another ground of defence, that the assignor did not duly assign the claim in suit in good faith, and that the assignment is void upon the words contained in the assignment; and to those two defences the plaintiff replies. The plaintiff has, therefore, (so far as these parts of his pleading are concerned,) selected these separate defences, and demurred to one and replied to the others. It was said that the reply denied the matter demurred to, because it denied every allegation in the answer inconsistent with the reply and demurrer. The plaintiff meant by this to except the matter demurred to, because a demurrer admits the facts to be true that are demurred to. But that is a very ambiguous mode of expressing such an idea, and it may be said with propriety that the allegation in the answer that the assignment was made to defraud creditors, is inconsistent with the allegation in the reply that the claim was assigned in good faith.

The plaintiff, if he still chooses to demur, must, therefore, express more distinctly what part he excepts from the denial in his reply, and amend his pleading accordingly; or he may, if he choose, extend his reply to the part demurred to, and the court at the circuit will give him the same advantage as if he had demurred to it.

As the part demurred to constitutes no defence, no costs are given.

SUPREME COURT.

WIES AND WIFE agt. SIDNEY FANNING.

Hypothetical, or *de bene esse* pleading is not allowable. For instance, such allegations as these: "If any ditch or trench was dug, it was done without the knowledge, &c.;" or, "If said Fanny fell therein, it was in consequence of her own fault, &c.;" or, "If such ditch or trench was dug, it was well and sufficiently guarded, &c."

It is entirely unnecessary for the defendant, in his answer, to assert the converse of a proposition, which the plaintiff must establish affirmatively before he can recover.

Wies and wife agt. Fanning.

Several matters contained in the answer in this case, struck out as irrelevant and redundant.

Albany Special Term, Aug. 1854.—Motion to strike out, &c.

The complaint states that the defendant, being the owner of certain premises in Albany, through his agents or servants, dug a ditch or trench, near said premises, extending across the sidewalk into the highway, and carelessly permitted the ditch or trench to remain open and uncovered, without fixing or placing any light near the same; and that, in consequence of such negligence and carelessness, the plaintiff's wife, in passing along the street, accidentally fell into the ditch or trench, and thereby was greatly hurt, &c.

The answer, after denying each and every allegation in the complaint, proceeds to say, that, "if any such ditch or trench was dug, it was done without the knowledge, consent, or direction of the defendant;" and that, "if the plaintiff's wife fell therein, it was in consequence of her own fault and negligence, and carelessness, and want of proper care, on her part;" and that "said ditch or trench, if dug, was well and sufficiently guarded, barricaded, and secured; that it was dug for the purpose of introducing water from the water-works, and under and by virtue of a permit from the Albany Water-Works Company, according to law;" and that a suit had been commenced by the plaintiff's against one Amos Fanning for the same cause of action, and that judgment had been recovered in that suit.

The plaintiffs moved to strike out the whole of the answer, except so much as denies the allegations in the complaint, as irrelevant, redundant, hypothetical, and insufficient.

THOMAS SMITH, *for plaintiffs.*

L. TREMAIN, *for defendant.*

HARRIS, Justice. It is impossible to say how many defences the pleader, by whom this answer was prepared, supposed he had, or intended to state. There is nothing to indicate where he intended one defence should end, or another begin. Some of the allegations, too, are obnoxious to the objection that they are made hypothetically. It is not good pleading to say, "if

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any ditch or trench was dug, it was done without the knowledge, &c.;" or, "if said Fanny fell therein, it was in consequence of her own fault, &c.;" or, "if such ditch or trench was dug, it was well and sufficiently guarded." (See *Van Santvoord's Pl.* 201, and cases there cited.) The defendant's counsel supposes that the recent case of *Butler agt. Woodworth* (9 *How.* 282) may be considered as an authority in support of such conditional pleading. But, I apprehend no one would be more surprised than the learned judge who delivered the prevailing opinion in that case to find it employed for such a purpose. The opinion is not preceded, as is usual, with a statement of facts. What the pleading before the court was in fact, we can only infer from the reasoning of the court in their opinions. The action was for slander; and it seems, from the first paragraph of the dissenting opinion of Mr. Justice CLERKE, that the defendant had first denied the allegations of the complaint; and then had alleged, in a second defence, matter of justification. The question discussed by the court, and decided, is, whether the two defences were inconsistent. In the correctness of the decision I entirely concur; but the question of hypothetical or *de bene esse* pleading does not seem to have been thought of by the court. It evidently was not in the case. When Mr. Justice ROOSEVELT, referring to the answer, said the defendant had first denied making the charge, and then, secondly, had said, "If I did, the charge was true;" he evidently referred to the practical effect of the pleading, and not to any conditional form of expression.

But there are still other objections to that portion of the answer embraced in this motion, which are equally fatal to its validity as a pleading. The plaintiff had alleged, in his complaint, that the defendant, through his agents or servants, had dug the ditch. The allegation, being material, and having been put in issue by the general denial in the answer, must be proved, before the plaintiff could recover. If proved, it would be quite immaterial whether the ditch was dug "without the knowledge, consent, or direction of the defendant" or not. This allegation, therefore, to say the least of it, was redundant.

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So, too, of the next allegation, that, if the said Fanny fell therein, it was in consequence of her own fault, &c. The plaintiffs, before they can recover, will be obliged to establish the fact that the accident occurred without any fault on the part of the wife. It may be that the complaint is defective for the want of a sufficient allegation to this effect; but, however this may be, it was entirely unnecessary for the defendant, in his answer, to assert the converse of a proposition which the plaintiffs must establish affirmatively, before they can recover.

The statement in the answer, that the ditch was well and sufficiently guarded, barricaded, and secured, was wholly unnecessary. The plaintiffs had alleged that the defendant had carelessly, &c., permitted the ditch to remain open, &c. This allegation had been controverted by the general denial. The affirmative allegation that the ditch had been well and sufficiently guarded, &c., did not require any more proof on the part of the plaintiffs, or authorize the defendant to give any more proof than if it had been omitted. It is obviously redundant.

The fact that the ditch was dug for the purpose of introducing water from the water-works, and under and by virtue of a permit, is entirely immaterial. Whether the allegation of such a fact remains in the answer or not, the defendant would not be allowed to give evidence of a matter so entirely irrelevant upon the trial.

Nor is the fact that a judgment has been recovered against another person for the same injury a defence to this action. If the plaintiffs are able to establish their cause of action against the defendant, he is not to be excused because another person has been found liable for the same injury, unless he can also show that the plaintiffs have received satisfaction from such other person.

The motion must, therefore, be granted with costs.

Crawford agt. Lockwood.

SUPREME COURT.

CRAWFORD, respondent, agt. Lockwood, appellant.

Defendant gave his promissory note on this wise: "\$33.67. Hammondsport, May 10, 1851. For value received, I promise to pay W. W. Bramhall or bearer, sixty days from date, the sum of thirty-three dollars and sixty-seven cents, *hereby waiving* the benefit of all and every exemption of property from sale on execution under the laws of this state."

The question is, did this *waiver* operate to subject his property, otherwise exempt, to the execution issued upon the judgment recovered on the note? *Held not.* Why? Because a waiver can not operate upon that which has no *present existence*. A *right* not yet in being, but which depends upon a contingency, can not be the subject of a waiver; in this respect it is like a *release*. Neither will the principle of *estoppel in pais* apply to such a case, for the reason that it relates not to a matter of fact, but to a matter of contract. There was no *fact* involved in the transaction of which the plaintiff was ignorant; and he is presumed to know the law and the legal effect of his agreement.

Whether this term "*hereby waiving*" would, in fact, amount to an *agreement* or *contract* to waive the exempted property, *Quere?*

Monroe General Term, 1854. JOHNSON, T. R. STRONG, and SELDEN, Justices.

This action was originally brought in a justice's court to recover the value of certain personal property, levied upon and sold by the defendant, who was a constable, by virtue of an execution against the plaintiff.

The defence was that the execution was issued upon a judgment in favor of W. W. Bramhall against the plaintiff upon a note, of which the following is a copy:

"\$33.67. Hammondsport, May 10, 1851.

"For value received, I promise to pay W. W. Bramhall, or bearer, sixty days from date, the sum of thirty-three dollars and sixty-seven cents, *hereby waiving* the benefit of all and every exemption of property from sale on execution under the laws of this state.

"(Signed) D. S. CRAWFORD."

It was admitted that the property taken was exempted by the statute, and the only question was, whether the waiver in the note was effectual to subject the property to the execution.

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The justice rendered judgment in favor of the plaintiff for fifty dollars damages, besides costs; which judgment, on appeal to the Steuben county court, was affirmed. The defendant appealed to the general term of the supreme court.

HENRY R. SELDEN, *for plaintiff.*

SELAH MATHEWS, *for defendant.*

By the court.—SELDEN, Justice. Although our statutes, exempting certain articles of prime necessity belonging to householders from levy and sale upon execution, were intended for the benefit of the entire family, and not of its head alone, still I entertain no doubt that the master of the family may waive the exemption.

This power results from the ownership of the property. He has the right to sell and dispose of it at pleasure; and may, of course, devote it or its avails to the payment of his debts, and may select his own mode of accomplishing this object. If he choose to turn the property out upon the execution, this is no doubt a waiver of the exemption. But the question here is, whether what was done *in this case* amounted to a waiver. To determine this, it is indispensable for us to know what is essential to a valid waiver.

The first remark I have to make then is, that a waiver is not, and bears no analogy to, a contract. The distinguishing feature of a contract is, its mutuality, its *quid pro quo*, or consideration. But no consideration is necessary to support a waiver. It is in this respect like a gift, to which, indeed, it bears in many respects a close analogy.

Gifts can only be made to take effect *in presenti*. *Blackstone* says, "A true and proper gift or grant is *always* accompanied with delivery of possession, and takes effect *immediately*." (2 *Black. Com.* 441.) Of course, then, a gift must be of something *in esse* at the time. There are three things essential to every gift, to wit: a donor, a donee, and a *thing to be given*. (*Dyer*, 244.) The thing, therefore, must exist at the time, or there can be no gift.

This results, first, from the import of the term itself. To

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give, implies, *ex vi termini*, a present transfer of the thing. But it also flows as a consequence from that principle of the common law, which prevents any contract from being obligatory, unless founded upon a sufficient consideration. So long as the gift is executory, it rests in agreement merely, and the want of consideration is fatal to it. It may be retracted at any time. Nothing short of the execution of the intent to give can make a valid gift. (2 *Black. Com.* 441; Pearson agt. Pearson, 7 *John.* 26.)

An agreement to give, founded upon a sufficient consideration, would no doubt be valid *as a contract*, but it would transfer no title.

The parallel in this respect between a waiver and a gift seems to me to be close, if not perfect. To waive, no less than to give, imports a present act. If I say, "I waive" some right which I may have next week, this can mean nothing more than that when the time arrives I will not insist upon the right. It cannot extinguish a right not yet *in esse*. It is executory in its nature, and may, therefore, if without consideration, be retracted at any time; and even if founded upon a good consideration, it is still executory, and can take effect as a contract only.

It is no answer to say, that *the right* existed in this case at the time of giving the note, and that nothing was wanting but the occasion for its exercise. *The law*, it is true, existed then, but there could be *no right* to have property exempted from execution until there was an execution. The property itself, to which the right attached, may not have had an existence when the note was given.

It is clear, therefore, that this was not an *executed* waiver; in other words, it was no waiver at all, but at most a mere agreement to waive.

There is another analogy which tends with equal force to the same conclusion. By the common law, a release can operate only upon a vested, and not upon a contingent right. A release of a possibility is void. For instance, an heir-at-law cannot release to his father's disseisor, because his heirship,

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and consequently the right released, is contingent. (*Co. Litt.* 265, *a*; 10 *Coke*, 51.)

So, if a conusee of a statute release to the conusor all his right to the law, he may, nevertheless, *sue out execution*, because he has only a possibility; but no vested right to the land. (*Co. Litt.* 265, *a*; *Cro. Eliz.* 552.)

So if the next presentation to a church be granted to A and B, and while the incumbent is living, A releases all his right and title to the presentation to B; this release is void, it being of a right not yet *in esse*. (*Cro. Eliz.* 173; 1 *Leon.* 167; *Dyer*, 244; 10 *Coke*, 48.)

Now, a release and a waiver are alike in this; when valid, each operates to extinguish a right. If, then, a release can not extinguish a right, the existence of which depends upon a contingency, how can a waiver do it? Are not the cases parallel in this respect? How can a waiver operate upon that which had no present existence more effectually than a release? I can see no reason for a distinction, and am forced, therefore, to the conclusion that a right not yet in being, but which depends upon a contingency, cannot be the subject of a waiver.

The defendant, however, seeks to apply the principle of *estoppel in pais* to the case, and claims that the plaintiff should be precluded from setting up and seeking to enforce a right which he had agreed upon sufficient consideration to relinquish.

But *estoppel in pais* is a rule of evidence, and not a mode of enforcing contracts. It does not appear that the principle has ever been resorted to, to compel a person to perform his engagements, where the *facts* involved were known to both parties. Its use is to preclude a party from maintaining by evidence that which he has before denied; or disproving that which he has before admitted; when the other party has acted upon the faith of the admission or denial, in such a manner that he will be injured, unless the same is held conclusive.

It will be seen, therefore, that it is essential to every *estoppel in pais*, that it relate to some *matter of fact* which has been previously either admitted or denied by the party claimed to be estopped. An admission by a person as to the law, or as to

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the legal effect of his contract, is never held to estop him. (Polk's Lessee agt. Robertson, 1 Term. R. 463; Boston Hat Manufactory agt. Messenger, 2 Pick. 228.)

It is also necessary that the fact should be one of which the party claiming the benefit of the estoppel was ignorant. The basis of an *estoppel in pais* is fraud. It is not, it is true, essential that there should have been an *intention* to deceive. But there must have been a confidence reposed, which would be betrayed to the injury of one party if the other is permitted to retract his admission or denial.

If we test this case by these rules, we shall see that it lacks the principal elements of an *estoppel in pais*. It relates not to a matter of fact, but to a matter of contract. There was no fact involved in the transaction, of which the defendant was ignorant; and he must be presumed to have known the law and the legal effect of his agreement. He could not, therefore, have been deceived in anything except the expectation that the plaintiff would perform his contract.

The case of Tuffts agt. Harris, (5 New Hamp. R. 452,) cited and relied upon by the defendant's counsel, is entirely different from this. There was in that case a palpable *misrepresentation* as to the ownership of the two cows, by which the officer was misled, and induced to levy upon the exempt cow. There is nothing of the kind here, no fact misrepresented or misunderstood; nothing whatever to bring the case within the principle of *estoppel in pais*.

I have thus far considered the case, as though the clause in the note "hereby waiving," &c., would amount to an agreement to waive the exemption, whenever an execution should be issued upon a judgment recovered upon the note. It may, however, be doubted whether such would be its effect. The terms import a present waiver, and not an agreement to waive in *future*; as a waiver *in presenti*, it would, as we have already seen, be inoperative. The words must undergo a material change by construction before they can be converted into an agreement to take effect in *futuro*. It is unnecessary, however, under the views already expressed, to decide this point.

The judgment of the county court must be affirmed.

Churchill and others agt. Churchill.

SUPREME COURT.

CHURCHILL AND OTHERS agt. CHURCHILL.

A variety of counts in a complaint upon the same cause of action is no longer allowable.

Under the present system, the party pleading should know, beforehand, what are his facts; which must be stated plainly and concisely, &c.

Albany Special Term, Aug. 1854.—Motion to set aside complaint.

The plaintiffs claimed to recover four sums of money, as follows: \$1,500, with interest from January 12, 1853; \$100, with interest from January 28, 1853; \$100, with interest from July 16, 1853; and \$48.25, with interest from August 12, 1853.

Sixteen causes of action are stated in the complaint. The *first* states that on or about the 12th day of January, 1853, the defendant received, from the Albany Savings Bank in the city of Albany, fifteen hundred dollars, money of Silas Churchill since deceased, who was the plaintiff's testator, to and for his use, and that he had not paid the same, &c. The *second* states, that some time in the year 1853, the defendant received *other* fifteen hundred dollars of the money of Silas Churchill upon his order, and in his lifetime, from the Albany Savings Bank, to be delivered to him, but that he did not deliver, &c. The *third* states, that in the year 1853 or 1854, the defendant received of the plaintiff's testator, for his use, *other* fifteen hundred dollars, which he has not paid, &c. The *fourth* states, that since the death of the plaintiff's testator, the defendant had and received of the plaintiffs fifteen hundred dollars, money of the plaintiffs, as executors, &c., which he has not paid, &c. Four other counts, or causes of action, substantially like those above mentioned, are stated, applicable to each of the remaining three sums claimed by the plaintiffs. The defendant moved to set aside the complaint, on the ground that it is not in compliance with the *second* sub-division of the 142d section of the Code.

J. H. REYNOLDS, *for plaintiffs.*

E. PAYN, *for defendant.*

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HARRIS, Justice. The plaintiffs assume that they have *four* causes of action. They claim judgment for no more; and yet they have stated in their complaint four times that number. It is apparent that the pleader, being uncertain what could be proved, and wishing to have a complaint which would be adapted to any imaginable state of facts which the trial might disclose, has, in accordance with the most approved precedents of common law pleading, expended his ingenuity in devising a variety of counts upon the same cause of action, so that, when the action should be tried, some of them might be found suited to the facts as they should appear in evidence. Such a mode of pleading is no longer allowable. The theory of the present system is, that the party pleading should know, beforehand, what are the facts upon which he will rely, and that the pleading shall contain those facts stated plainly and concisely, without unnecessary repetition. . Whatever more a pleading contains is unauthorized, and may be stricken out. (Stockbridge Iron Company agt. Mellen, 5 How. 439.)

The motion to set aside the complaint must be granted, with costs, but with liberty to the plaintiff to serve an amended complaint, within twenty days after notice of this decision.

SUPREME COURT.

**ANDERSON AND OTHERS agt. THE ROCHESTER, LOCKPORT, AND
NIAGARA FALLS RAILROAD COMPANY.**

It is a point incontrovertibly settled by authority of the courts and the universal practice of the construction of such roads, that a *railroad* running through a city is not *per se* a *nuisance*.

Although, frequently, railroads may be productive of great inconvenience and annoyance to individuals, yet they constitute one of the prominent improvements of the present progressive age, and are matters of public necessity.

Where the plaintiffs complained that the construction of the track of the defendants' railroad, and the running of cars thereon, &c., through a public square in the city of Rochester, within sixty-five or seventy feet (including a street)

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of the front of plaintiffs' dwellings, would be productive of annoyance so great as to amount to a nuisance—*held*, that it was equivalent to saying that the railroad through the city was a nuisance *per se*. Because, it is impossible to construct such a road through a city or populous village without, in very many instances, bringing the line of the track within that distance of the dwellings of the inhabitants.

Where it was alleged that part of a *public square* in the city of Rochester had, some thirty years since, been dedicated by the original proprietors to the city for such use, and the remaining part, or enlargement, had been acquired by the city, for the same purpose, by purchase; and the plaintiffs claimed as proprietors of lots fronting on the square, holding the title thereto by purchase from the original proprietors, also; and averring that a large share of the expense attending the enlargement of the square was assessed upon the lots fronting thereon, on the ground that they were to be benefited by such enlargement, and that thereby they had acquired a legal or equitable interest in the lands constituting the square, which entitled them to personal compensation before any portion of it could be taken for a public use, (a railroad;) and alleged that they should be made parties to the proceedings under the railroad act to acquire the title.

Held, that by the dedication of the land for the square, the naked fee remained in the original proprietors, and the public acquired an easement merely, which vested in the corporation of the city, which became the *trustee of a use*.

The plaintiffs had no *private easement* in the square, *separate and distinct* from that held by the corporation in trust for *all* the citizens.

Although the corporation held the lands *purchased* and added to the square by a tenure different from that of the other portion, because it had the *fee* and not a mere easement, but still holding the whole *in trust* for the public use, yet no part of the title was vested in the owners of lots fronting upon it. The plaintiffs' rights differed only in *degree*, and not in kind from those of other citizens owning lands not adjoining the square, which might have been assessed in common with them.

A railroad company, by proceeding under section 14, and the subsequent sections of the general railroad act to acquire title to land, obtain no greater right or title than the parties against whom they proceed possessed.

In this case, therefore, the defendants, having proceeded under the above-mentioned sections of the act, acquired no right to use this square for any purpose inconsistent with the object of its dedication. They should have proceeded under section 26 of the railroad act, which provides for cases of lands held in trust.

But the plaintiffs being beneficiaries of the trust in this case, in common with the whole public, could not, nor could any of the citizens, as *cestuis que trust*, proceed in their own names against a *stranger* to the trust, except where the acts of such stranger were productive of some special injury to the parties complaining, not common to all the *cestuis que trust*.

Held, therefore, that the plaintiffs were not entitled to the relief they asked, unless it appeared that the construction of the defendants' road, as proposed,

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would so seriously impair the plaintiffs' enjoyment of their use in the square as to amount to a *special nuisance* to them individually, and not otherwise. The defendants in this case having executed a covenant to the city of Rochester not to erect any buildings upon the square, nor to suffer any trains of cars to stand or remain thereon, *held*, that the inconveniences affecting the rights of the plaintiffs, by running the defendants' road on the side of the square—such as the obstruction of light, air, prospect, and of a public promenade, &c.—could not be considered such annoyance as to amount to a *private nuisance*: consequently the defendants should not be restrained, on the complaint, from proceeding with the erection of their road.

Monroe General Term, 1854.

JOHNSON, T. R. STRONG, and SELDEN, Justices.

This is an appeal from an order made by one of the justices of this court, at chambers, restraining the defendants from constructing the track of their railway across an open space in the city of Rochester, called Brown's square.

The complaint states that the square was laid out and dedicated to the public use as an open square, by the proprietors of the tract of which it is a part, more than thirty years ago; that at the time of such dedication the proprietors laid out the surrounding and adjoining lands into village or city lots, and that one object of the said proprietors in so laying out and dedicating the said square was to increase the value and facilitate the sale of the said lots; that in the year 1840 the common council of the city of Rochester purchased a quantity of ground adjoining the northern end of the square, and added the same thereto; that this addition to the square was made at an expense of several thousand dollars; that McGlachlin & Goss, two of the plaintiffs, are respectively owners of lots fronting upon the square as originally laid out, and the plaintiff Anderson of a lot fronting on the new portion thereof; that a large share of the expense attending the enlargement of the square was assessed upon the lots fronting thereon, on the ground that they were to be benefited by such enlargement; and that the plaintiffs claim, by means of these premises, to have acquired a legal or equitable interest in the lands constituting the said square.

The complaint further states, that the defendants have instituted proceedings under the general railroad act for the purpose

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of acquiring a right to lay their track across the said square, to which proceedings the city of Rochester and the original proprietors of the land constituting the square alone were made parties: that the land which the defendants desire to appropriate for the purposes of their road consists of a strip of fifty feet in width across the west side of said square: that the plaintiffs' lots are separated from the square by Kent-street, which runs along the west side thereof, and is sixty feet in width—thus bringing the front of said lots within sixty feet of the strip of land taken for the road: that under the proceedings thus instituted commissioners of appraisal had been appointed, who had appraised the damages and made their report, by which they had awarded to the city of Rochester two thousand nine hundred dollars, and to the original proprietors one hundred dollars; and that the defendants are about to apply to the court for the confirmation of the report, and avow their intention immediately to enter upon and take possession of the premises for the purpose of constructing their railroad track across it.

It then alleges that the laying of the track of the road across the said square will greatly diminish the value of the plaintiffs' lots, and render the enjoyment of them uncomfortable: that the running of cars on the said track will expose their dwellings to destruction by fire, and produce great annoyance by noise, by smoke from the engines, and by frightening horses which may be hitched in front of their houses: and that the defendants have not made to the plaintiffs, or either of them, any compensation for the damages which they will thus sustain; and demands judgment that the defendants make compensation for such damages, and for the plaintiffs' interest in the land to be taken before they enter thereon for the purpose of constructing their road, and that in the mean time they be restrained from taking possession of the same.

Upon the hearing at chambers, which was upon notice to the defendants, affidavits were produced and read on the part of the defendants, showing that the city of Rochester had acquired the title to that portion of the square which had been added thereto, as stated in the complaint, under the provisions of the

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city charter obtained in 1884: that upon the hearing before the commissioners of appraisal, the city of Rochester appeared and claimed the whole of the compensation to be awarded for taking the said strip of land; and the original proprietors of the soil also appeared and claimed compensation for the same: that the appraisal and report of the commissioners awarding two thousand nine hundred dollars to the city, and one hundred dollars to the original proprietors, had been confirmed, and the sums so awarded paid by the defendants: that before the commissioners proceeded to make said appraisal, the defendants executed a covenant to the city of Rochester, by which they agreed, in substance, that the strip of land to be taken should only be used for the passage of cars across the same, and that no buildings should be erected thereon, nor any cars suffered to stand upon the track or any part of the square; and containing further provisions for the preservation of the trees and for making an ornamental fence along the railroad track.

ORLANDO HASTINGS, *for plaintiffs.*

SELAH MATHEWS, *for defendants.*

By the court—SELDEN, Justice. From the statements in the complaint it is evident that the plaintiffs claim the interference of this court upon two grounds, entirely distinct and independent of each other. One is, that the construction of the track of the defendants' road, and the running of trains of cars so near the plaintiffs' dwellings, will be productive of annoyances so great as to amount to a nuisance, which the court is bound to prevent; and the other, that the plaintiffs have a legal interest in the strip of land appropriated for the road, which the defendants are about to take from them by the construction of their railroad without having made any compensation therefor; contrary to the provisions of the constitution. These two grounds are somewhat blended in the complaint, but they are distinct in their nature and must be separately considered.

In regard to the first, it is to be observed that the plaintiffs' lots are upon one side of Kent-street, and the strip of land upon which the railroad is to be constructed is upon the other. This

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street is sixty feet in width, so that the distance between the cars, as they pass, and the plaintiffs' dwellings cannot be less than sixty-five or seventy feet.

It is obvious that it is impossible to construct railways through cities and populous villages without, in very many instances, bringing the line of their track within this distance, or even much less, of the dwellings of the inhabitants. There is nothing in any of the annoyances specified in this case which differs in the slightest degree from those which would naturally occur in every instance in the construction of a railway within the same proximity to a dwelling. It follows, therefore, that if the defendants' railway is such a nuisance as entitles the plaintiffs to an order prohibiting its construction or use, then every railway about to be constructed through a city or village so as to approach within sixty or seventy feet of a dwelling, is to be so regarded, and its construction is liable to be restrained.

This is of course equivalent to saying that a railroad through a city is, *per se*, a nuisance, and should be prohibited. Can such a position be sustained? Railroads have repeatedly been constructed, and are daily being constructed through the cities and villages of this and other countries; but no court has yet been found to declare them to be either public or private nuisances. They are no doubt productive of great inconvenience and annoyance to individuals; but they constitute one of the prominent improvements of the present progressive age, and are matters of public necessity. The question whether a railroad is, *per se*, a nuisance has been presented to, and decided in the negative by the judicial tribunals of this and other states. (Hamilton agt. The New York and Harlem Railroad Company, 9 Paige, 171; Lexington and Ohio Railroad Company agt. Applegate, 8 Dana, 289.)

But the late case of Drake agt. The Hudson River Railroad Company (7 Bar. S. C. R. 508) bears with the greatest force upon the point we are considering. There the track of the road was to be laid along the middle of a street ninety feet in width, upon which the dwellings and stores of the plaintiffs were situated. The plaintiffs in that case, therefore, must no-

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cessarily have been subjected not only to all the annoyances specified by the plaintiffs here, but many others equally troublesome. If the track of the defendants' road in that case, laid down through the centre of one of the principal thoroughfares of the city of New-York, was not to be treated as a nuisance, how is it possible that this road, which leaves an entire street unobstructed between it and the plaintiffs' tenements, should be regarded as such?

I consider this point as incontrovertibly settled by this and the two previous cases to which I have referred, and the universal practice of constructing such roads.

This brings me to the consideration of the question, whether the plaintiffs have such an interest in the land constituting this public square as entitles them to personal compensation before any portion of it can be taken for a public use, and requires that they should be made parties to the proceedings under the railroad act to acquire the title.

The dedication of this square to the use of the public was in the customary mode, by the act of the proprietors in laying out the tract into city or village lots, with streets, avenues, &c., leaving this square as an open space; and by the corresponding acts of the corporation and the public in recognizing the space as a public square, and using it as such.

The principal effects of such a dedication are plain and obvious. The naked fee of the land remains in the original proprietors, and the public acquire an easement merely, co-extensive with the purposes to which such open squares in populous towns are usually appropriated; and where there is a corporation to represent the public, and take charge of its interests, the easement vests in such corporation, which thus becomes the *trustee of a use*. In this all the authorities concur; for, although it is said by the CHANCELLOR in the case of *The Trustees of Watertown agt. Cowen*, (4 *Paige*, 510,) that the supreme court of the United States had held, in *City of Cincinnati agt. Lessees of White*, (6 *Peters*, 431,) that the *legal title to the land* thus dedicated vests in the corporation: yet a careful examination of the latter case will show that no such doctrine is ad-

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vanced in it. On the contrary, the case of *Lade agt. Shepherd* (2 *Stra.* 1,004) is cited and relied upon, which expressly holds that in cases of dedications to a public use, the fee of the land remains in the original proprietor; and that case is said to prove, "that it is not necessary that the fee of the land should pass in order to secure the easement to the public." This is the established doctrine in relation to lands dedicated to public use as highways and streets. *Trustees of Pres. Soc. in Waterloo agt. The Auburn and Rochester Railroad Company*, (3 *Hill*, 567;) *Wyman agt. Mayor, &c., of New-York*, (11 *Wend.* 486,) and the effect of a dedication for the purpose of a public square or common is in all respects the same. In *City of Cincinnati agt. Lessees of White supra*, the court say, "The right of the public to the use of the common in Cincinnati must rest on the same principles as the right to the use of the streets;" and in *Trustees of Watertown agt. Cowen*, the CHANCELLOR, after stating the doctrine of the courts in relation to lands dedicated for streets and avenues, says, "And this principle is equally applicable to the case of a similar dedication of lands in a city or village to be used as an open square or public work."

After the dedication of the square in question, therefore, the naked fee of the land composing it remained in the original proprietors, while the easement vested in the corporation of the village or city, which, for aught that appears in the case, existed at that time.

Had the proprietors of lots fronting on the square, holding the title thereto by purchase from the original proprietors, also, as the complaint assumes, an easement in the square *separate and distinct* from that held by the corporation in trust for all the citizens?

Such an easement, if it exist at all, must have had a definite legal origin. It is an interest held by one person in the lands of another, and must of course have been in some way conveyed. There is but one position, as I conceive, which can with any plausibility be taken in respect to the origin of the easement claimed. It is this: that the same act on the part of the original proprietors which the law construes to be a dedication of

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the square to the public use, creates and annexes as an appurtenance to the adjoining lots an easement or right to have the ground composing the square kept perpetually open: and that the purchasers of those lots are presumed to have paid a consideration for the value thus added thereto.

But there are serious objections to taking this view of the subject. In the first place, notwithstanding the numerous cases in which the effect of such dedications has been considered, not an intimation has been given of the existence of any such private easement as distinct from the public right, unless a single expression of the CHANCELLOR in the case of Trustees of Watertown agt. Cowen should be so construed. There was in that case a special covenant by the grantor that the square should be kept open: but the CHANCELLOR says, "If the owner of the public square had already dedicated it to the public, *no special covenant was necessary* to authorize his grantees to insist that it should be kept open for their benefit or their assigns."

I do not, however, understand this as asserting the doctrine contended for here, but as simply affirming the principle of the case of Corning *et al.* agt. Lowere, (6 *John Ch.* 439,) in which it was held that the owners of tenements on a public street were entitled to an injunction to prevent the obstruction of such street by building a house upon it, on the ground that the proposed erection would amount to a *private nuisance*.

But another objection to the position of the plaintiffs, that the dedication of the square created a private easement which became appurtenant to the adjoining lots is this: that it establishes a double right to the same easement. It is conceded that the corporation are invested by the dedication with the right, and are charged with the duty of keeping the square perpetually open for the use and benefit of *all* the citizens, including of course the owners of lots fronting thereon. This right is an easement which is vested in the corporation as trustees. How, then, can a portion of the same easement be vested in the plaintiffs? It is clear, I think, that such an overlapping of rights cannot exist.

But the case of Drake agt. The Hudson River Railroad Com-

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pany, (7 *Bar. S. C. R.* 508,) before cited, is a direct authority upon this question. It has already been shown that the effect of a dedication of land in a city or village for a public square is the same as that for streets and avenues, &c.; and in the case last cited it is expressly held, that the owners of lots fronting directly upon a street so dedicated acquire no greater rights than other citizens. JONES, the presiding justice, after stating the plaintiffs' right to the full and free use of the street on which their tenements front, for access to their dwellings, and for the convenience and accommodation of their residences and business pursuits, says, "But they can claim no greater right or interest in the streets than such full use and benefit of them as public streets. *All other citizens have an equal right with them to such use thereof as public streets.*"

And again he says, "But we cannot agree that the plaintiffs, or those from whom they derive their title, acquired or possess any special right to, or interest in the said streets, or the lands forming the same."

This is directly to the point, and ought, perhaps, in the absence of authority to the contrary, to be considered as decisive. I am unable to discover any substantial difference in this respect, so far as the rights and interests of the plaintiffs are concerned. The city of Rochester is authorized by its charter to acquire the title to these lands for *public* uses. It holds the lands purchased and added to the square by a tenure different from that of the other portion, because it has the fee and not a mere easement; but still it holds the whole *in trust* for the public use; and no part of the title is vested in the owners of lots fronting upon it. The plaintiffs were heavily taxed to pay for the land purchased; but they do not aver that they and those similarly situated paid the whole purchase money, nor is this to be inferred. Their rights differ only in degree, and not in kind, from those of other citizens owning lands not adjoining the square, which may have been assessed in common with those of the plaintiffs. The dedication in this case is by the city itself, the corporation retaining both the fee and the easement for the benefit of the public.

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But these conclusions are not entirely decisive of the case. It is important to inquire what rights have been acquired by the defendants by the proceedings to obtain the right-of-way for their road across the square in question.

It will be conceded, I think, that the corporation, or it and the original proprietors combined, had no power to sell this square to be converted to purposes other than those for which it was dedicated. The title of the corporation was a trust merely to be exercised for the benefit of the citizens. Could the defendants, by proceeding under section 14, and the subsequent sections of the general railroad act, obtain any greater right or title than the parties against whom they proceeded possessed? If, not, then the defendants here have acquired no right to use this square for any purpose inconsistent with the object of its dedication.

The railroad act itself shows that this was the view taken by the legislature of the effect of proceedings under it. Section 13 provides, that in case any company is unable to *agree for the purchase* of any real estate required by them, they may then proceed under the subsequent sections to acquire the title, that is, as would seem naturally to follow, such title as might have been obtained by purchase if the parties could have agreed.

But section 26 leaves no doubt that such is the meaning of the act. That section provides expressly for cases where the title to the land required is vested in persons who have no power to sell; and among others for the case, of lands held in trust. If we are right, then, in supposing that the title of the corporation is a trust merely, and that such trust is limited to the purposes for which the land was dedicated, it is clear that the proceedings to acquire this land should have been had under the provisions of section 26.

It does not follow from this, however, that this action can be maintained. The plaintiffs are beneficiaries in common with the whole public of the use to which this land has been devoted, having, as we have shown, no interest in the land itself.

In trusts of this public nature, if the trustee, as in this case

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the city of Rochester, violates its duty by authorizing an encroachment upon the rights of the public, any of the citizens, as *cestuis que trust*, may institute a suit *against such trustee* to enforce the trust. But none of the beneficiaries of the trust can proceed in their own names against a *stranger* to the trust, except where the acts of such stranger are productive of some special injury to the parties complaining, not common to all the *cestuis que trust*. Lawrence agt. The Mayor, &c., of New-York (2 Barb. S. C. R. 577) is a case of the former kind; and Corning agt. Lowere (6 John. Ch. R. 439) of the latter.

This suit can be maintained, therefore, and the plaintiffs are entitled to the relief they ask, if it appears that the construction of defendants' road, as proposed, will so seriously impair the plaintiffs' enjoyment of their use in this square as to amount to a special nuisance to them individually, and not otherwise. It is true, the plaintiffs have not put their case upon this ground; but the essential facts to present the point are before the court.

This is not identical with the question first discussed.

The inquiry there was, whether the railroad, on account of its proximity merely to the plaintiffs' dwellings, and irrespective of any direct interest they may have in the land constituting the square, would be such a nuisance as this court is bound to restrain. Here it is, whether it is such, by reason of its interference with the special enjoyment by the plaintiffs of the benefits of the square.

We are to consider this point irrespective of the fact that the proceedings of the defendants, under the railroad act, gave them no title to the easement, because it belongs to the corporation alone to protect that title. These plaintiffs can have relief only upon the ground of interference with their personal enjoyment of the square.

What, then, are the benefits afforded by this square with the enjoyment of which this road will interfere? They, of course, are those of light, air, prospect and of a public promenade. This, I think, embraces all.

Now, it is not every encroachment upon the enjoyment of a

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right of this description which will justify this court in the exercise of its restraining power.' Although it may be so great as materially to diminish the value of the plaintiffs' property, it does not follow that this court will interfere on the ground of nuisance. (Fishmongers' Co. agt. East India Co., 1 *Dickens* R. 164; Attorney General agt. Nichol, 16 *Vesey*, 338.)

In this last case the bill was filed to prevent the erection of an equestrian statue of George III. upon an open triangular space in front of the plaintiff's premises in the city of London, at a point where several streets converged. The plaintiff claimed that there was an implied covenant by the commissioners of Woods and Forests, of whom he purchased, to keep the space open. This point, however, was ruled against him; but he also claimed that the statue would be a nuisance; and upon this subject the Lord CHANCELLOR says:

"It is said the statue will be a public nuisance. This it can only be by obstructing the carriage-way; but I am clearly of opinion that the erection of the statue will, upon the whole, be a great benefit to the public; by which I mean the public as contradistinguished from the occupiers of the adjoining houses. It is quite immaterial in my view of this case, whether a majority of the inhabitants of the neighboring houses do or do not object to the erection of the statue, and I give no opinion as to whether it is likely to depreciate the value of the property of the plaintiffs or to interfere with their enjoyment of it; of that they are the best judges: but I am very clearly of opinion that the injury and inconvenience, if any, do not constitute such a description of *private* nuisance as would justify the interference of this court upon that ground."

Now, this is in principle a parallel case to the present; because, although the plaintiff failed to establish an agreement on the part of the commissioners of Woods and Forests to keep the triangular space open, yet the evidence of dedication to the use of the public was as unequivocal in that case as in this.

The case, therefore, is important as showing: 1. That the injury and inconvenience complained of in such a case may be considerable, and even so great as "to depreciate the value of

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the property of the plaintiffs, or to interfere with their enjoyment of it," and yet not constitute such a *private nuisance* as would justify the interference of the court; and, 2. That where the public have an interest in the work objected to, this is to be taken into consideration, and individuals are required to submit to some trifling inconvenience for the general benefit.

Let us test this case by these principles. What are the inconveniences affecting their rights as *cestuis que trust* of this square, to which the plaintiffs are called upon to submit? It is to be borne in mind that the defendants have executed a covenant to the city not to erect any buildings upon the square, nor to suffer any trains of cars to stand or remain thereon.

First, then, in respect to light. The plaintiffs have in front of their dwellings an open street, sixty feet in width, and then this open square. Is it possible they can ever appreciate the diminution of light produced by the passage of a train of cars across the square? Clearly not. The same may be said in regard to air. No appreciable effect can be produced in this respect.

Then as to prospect. It has been said in some cases, that a right to a prospect not being a matter of necessity, but of pleasure merely, the law would not protect it. I apprehend, however, that this cannot apply to a case of this kind, where prospect as a matter of ornament was one of the objects of the dedication. I have no doubt that a court of equity ought to enjoin any erection which would materially obstruct the view afforded by keeping the square open.

But to what extent would the prospect of the plaintiffs be obstructed by the occasional passing of a train of cars along the track of this road? No one will say that the annoyance arising from this is worthy of a moment's consideration. It may be doubted whether it would not be an agreeable variation of the scene rather than otherwise.

The greatest of this class of annoyances beyond question will be, the having frequently to cross the railroad track in going to and from the square and other places. This is no doubt an inconvenience, but one which is almost inseparable from a residence in a city at the present day.

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It is impossible to hold that railroads shall not be constructed; and wherever they may be located, people must cross them. It is a trifling inconvenience to which they must submit for the public benefit. The track of this road occupies but a small portion of the square, and does not, therefore, materially abridge the privilege of using it as a promenade. But if it did, it is difficult to see how in this particular the road produces any special injury to the plaintiffs beyond that done to other citizens who have an equal right to the use of the square; and if not then the corporation, and not the plaintiffs must bring the suit.

But it may be said that the annoyances which we have here noticed should be combined with the others specified in the complaint, to wit: noise, smoke, the frightening of horses, &c., in order to determine whether the road is a nuisance.

The defendants had a right under section 28, sub. 5, of the general railroad act, to have constructed their track along Kent-street, directly in front and within a few feet of the plaintiffs' dwellings, and the plaintiffs would have been without remedy, according to the decision in the case of Drake agt. The Hudson River R. R. Co., *supra*. Ought they, then, to complain that it has been removed some forty or fifty feet further from their doors?

The track was no doubt located along the side of the square, with a view to producing as little annoyance to the neighborhood as practicable; and unless we are to come to the conclusion that railroads in cities are nuisances, *per se*, I do not see how this road can be considered as such.

In granting the restraining order in this case, I acted under the impression that the plaintiffs might be regarded as the proprietors of an easement which gave them an interest in the land constituting the square; and, consequently, that the defendants were about to take the private property of the plaintiffs for a public purpose without compensation; but having become satisfied that this supposition was erroneous, I think for the reasons here given, that the order cannot be sustained. It is, therefore, reversed and vacated.

Willis agt. Chipp.

SUPREME COURT.

WILLIS agt. CHIPP.

A defendant may now, after suit brought, settle the cause of action, and then in his answer set up such settlement by way of defence.

Ulster Special Term, April, 1854. Motion for judgment on account of the frivolousness of the defendant's answer. The complaint was for an assault and battery, alleged to have been committed by the defendant. The defendant, in his answer, states that the assaulting, &c., "has been fully settled and arranged between the plaintiff and defendant, and full satisfaction acknowledged by the plaintiff to the defendant."

E. COOKE, *for plaintiff.*

H. CHIPP, *for defendant.*

HARRIS, Justice. At common law a defendant could not, under the general issue, give evidence of payment or satisfaction of the plaintiff's demand after the return day of the writ. Such a defence, to be available, must be pleaded specially. *Boyd agt. Weeks, (2 Denio, 321.)* But, under the Code, no such distinction obtains. The defendant may, after suit brought, settle the cause of action, and then, in his answer, set up such settlement by way of defence. Any facts existing at the time the defendant answers, and which show that the plaintiff ought not to have a judgment against the defendant, may be inserted in the answer. Here, the defendant says, in his answer, that he and the plaintiff have settled the cause of action upon which the plaintiff relies as the ground of a recovery against him, and that the plaintiff has acknowledged full satisfaction. If this be so, it is a good defence to the action, even though the settlement has taken place and the satisfaction has been acknowledged since the action was brought. The matter stated in the answer constitutes a defence. The motion must, therefore, be denied with costs.

Saul agt. Kruger.

SUPERIOR COURT.

SAUL agt. KRUGER.

The interest of a bailee or pledgee for security in goods in their possession may be taken and sold on execution against them. The purchaser obtains their right and interest in the goods pledged. Therefore, an action to recover possession of such property from the officer can not be maintained by an individual in possession, and having an interest therein as bailee or pledgee.

General Term, June, 1854.

Present—DUER, CAMPBELL and HOFFMAN, J. J.

P. T. WOODBURY, for plaintiff.

J. S. CARPENTIER, for defendant.

By the court—HOFFMAN, Justice. The action is to recover possession of certain personal property, consisting of twenty-four letter-clips, and a model of the steamship Sultana. The defendant is one of the constables of the city, authorized to serve process issuing out of a justice's court. On the 27th of October, 1852, an execution issued against the goods and chattels of John Doe and Richard Roe, comprising the firm of P. W. Byrne & Co., directed to levy the sum of \$35, recovered in a justice's court, and also the sum of \$3.87 for costs and charges. The defendant avers that on the said 27th of October, 1852, he levied upon the goods in question, then being the goods and property of P. W. Byrne & Co.

Upon the trial the jury found a verdict for the defendant, assessing his damages at \$42.89, and finding the value of the property at the sum of \$112. The property had been replevied at the commencement of the suit, and delivered to the plaintiff under the 211th section of the Code. It is proven by the plaintiff's admission that the model of the steamship belonged to one Captain Hall, and was left in Saul's possession. At the office at which it was kept, the signs of Edward Saul and of P. W. Byrne & Co. were conspicuous. A lease had been made out in the name of P. W. Byrne & Co., by Edward Saul, as their agent; the whole office was rented to P. W. Byrne &

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Co. Saul had a sign up as commission merchant. This lease was destroyed on the failure of that firm. When that took place does not appear.

Again, the testimony of Lilly is decisive to show that the model belonged to Captain Hall, and that P. W. Byrne & Co. were the parties entitled to a lien upon it for the amount of an advance of \$25. He adds that Saul was sometimes doing business as the agent of P. W. Byrne & Co., and sometimes as a partner.

The libel in admiralty, which has been produced, was considered by the judge at the trial as conclusive in establishing that Saul was a member of the firm.

From the view we have taken of the case, it is not necessary to decide the exception taken on this ground, nor the exception for excluding the evidence as to who composed the firm of P. W. Byrne & Co. two years before the trial.

Two important questions have been made on the part of the defendant.

First. That the right as pledgees was undoubtedly in P. W. Byrne & Co. The possession was given originally to them. The presumption is that it remained in them. If Saul was a member of that firm, his manual possession was that of the firm. If he was not a member, his possession was as the agent of the firm; but in either case, both the lien as pledgees and the possession was legally in them. And they could not maintain replevin, being defendants in the judgment. (Clark agt. Skinner, 20 *John. Rep.* 467; Gardner agt. Campbell, 15 *John. Rep.* 401.)

If the interest of a pledgee to the extent of that interest can not be taken on execution, then he may replevy. But then the firm should have brought the action. The plaintiff is proven not to have had any interest in the property unless as a partner. If he was a partner then, he, in the name of the firm, should have brought the action.

Second. As some doubt, however, is entertained by one of the court, whether Saul could not still support the action upon the basis of his possession, provided the property was not liable

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to an execution, we have considered the other ground, viz., whether the interest of a bailee for security in goods in his possession may be taken on execution against him. This question is stated by Justice STONY to be unsettled. (*On Bailment.*)

It is true that the rule in the case of mortgages of real estate is, that an execution may not be levied upon the interest of a mortgagee upon a judgment against him. But this is only the rule before entry or foreclosure. And it was once held in Connecticut that such interest might be taken even before foreclosure. (Row agt. Couch, 1 *Root's Rep.* 452; see Huntington agt. Smith, 6 *Conn. Rep.* 235; Blanchard agt. Colbourne, 16 *Mass. Rep.* 345; Jackson agt. Willard, 4 *John. Rep.* 41; Jackson agt. Dubois, *id.* 216; Collins agt. Terrey, 7 *John.* 278.) When there is a forfeiture and possession, it is presumed the execution may be levied.

But it is decided that personal property in the hands of a mortgagee may be taken upon an execution against the mortgagee after forfeiture. (Ferguson agt. Lee, 9 *Wendell*, 258.)

The chief distinction between a pledge and a mortgage of chattels is, that delivery of possession is essential to the former, and that no forfeiture is worked by failure to perform the condition; but the pledge must be sold by process of law, or upon reasonable notice. (Cortelyou agt. Lansing, 2 *Caine's Cases*, 200; Hart agt. Ten Eyck, 2 *John. C. R.* 62; Ward agt. Sumner, 5 *Pickering*, 59.) We see nothing in these distinctions to exempt property pledged from the same liability as property mortgaged.

Upon this subject we refer also to the rule stated by Chief Justice SAVAGE in Otis agt. Wood, (3 *Wendell*, 500,) that where a person is in possession of a chattel, having a right to such possession for a specific time, he has an interest in it, which may be sold. When that interest expires, the owner is entitled to his goods.

The right of an execution creditor against a mortgagor to levy upon the mortgaged property received consideration in this court in the case of Carnley agt. Hill, (11 *Legal Observer*, 334,) and was determined in Mattison agt. Baucus, (1 *Comstock*,

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295.) Where the mortgagee has the immediate right of possession, so that there is nothing but a right of redemption in the mortgagor, the property cannot be levied upon under an execution against him. But if he has the right of possession for a definite period, it appears that it may be.

The principle of such cases seems to be, that possession, coupled with an interest, renders the property liable.

Again, with respect to the rights of a pledgee, it has been decided that the owner of a saw-mill, who had sawed logs, retained a lien upon them, although removed, by agreement, from the premises, so that he could sustain replevin against the sheriff for taking them upon an execution against the owner. (Wheeler agt. McFarland, 10 *Wend.* 318.)

So the pledgee may have an action of trover against any one who converts the goods by authority from the general owner. (Ingersoll agt. Van Bohelin, 7 *Cowen*, 670.) And in the well-considered case of Bradock agt. Murray, (3 *Vermont Rep.* 302,) it was held, that the bailee of a chattel, coupled with an interest, might sustain trespass against the bailor and general owner.

These authorities show that a pledgee of goods, with an interest in them as security for a debt or demand, is armed with the whole power and remedies of the law to protect his possession, and support his claim. It would be anomalous if a right and interest so guarded should not be amenable to a judgment in favor of his creditor.

It was a rule of the common law that goods pawned or pledged could not be taken in execution against the pawnor. (Cases cited by JEWETT, Ch. J., in Stief agt. Hart, 1 *Comstock*, 28.) This was redressed by the statute of 1830, 2 *R. S.* 366, § 20, by which the right and interest of the person making the pledge might be sold on execution against him, and the purchaser would acquire all his title and interest, and should *have possession on complying* with the terms and conditions of the pledge.

In Stief agt. Hart, (1 *Com.* 20,) the supreme court had determined that upon such an execution the sheriff might enter into possession of the property pledged, in order to sell it.

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This was affirmed upon an equal division (four to four) of the judges in the court of appeals. But it was also allowed that when the sale was consummated the property was to be re-delivered, and could be held until the purchaser redeemed it. If a statute was necessary to authorize a levy upon an execution against a pledgor, then either the goods might be taken as against the pledgee or the property was wholly beyond the reach of the common law process, a conclusion not readily to be admitted.

We do not see any such inconsistency or practical embarrassment from the establishment of the rule now stated as counsel insist upon. The purchaser, under a judgment against the pledgee, obtains the possession, and the right and interest of the pledgee. The purchaser, under an execution against the pledgor, obtains his right to reclaim the property upon fulfilling the terms of the pledge. There is merely a substitution of persons representing and holding the same rights.

But the remarks of the court in *Carnley agt. Hill*, as to the duties of the sheriff, in selling only the actual interest affected by the execution; and to make inquiry what is such actual interest as claimed, are as applicable here as to the case in which they were made.

The judgment is affirmed with costs.

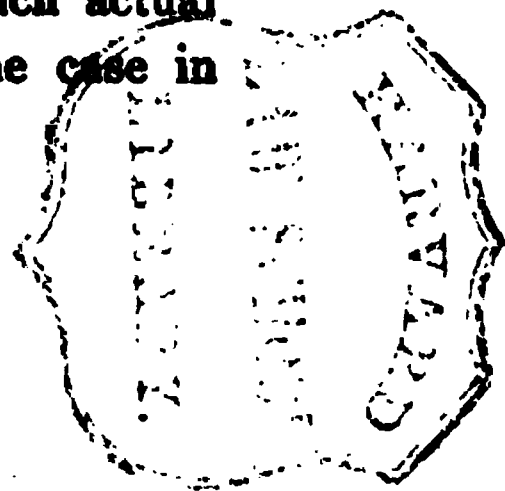
SUPREME COURT.

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A *special term* of the supreme court has jurisdiction to hear a motion made upon the ground of irregularity in obtaining a judgment or order at *general term*, where the point was not before the latter court.

Or, if the judgment or order obtained at general term was regular, and the moving party seeks relief by excusing his default, then the application may properly be made at special term. It is different where the motion necessarily requires a reconsideration of the adjudication at general term. (*This agrees with Corning agt. Powers, ante, p. 54.*)

The parties in this case, after a series of defaults and motions, set right by the court, so that the cause might be disposed of without a repetition of such matters.



Ayres agt. Covill.

Essex Special Term, March, 1854.—This was a motion on the part of the plaintiff to set aside an order granted by default at the last special term at Ballston, held by Mr. Justice CADY. The ground of the application, as stated in the notice, was, that the special term had no power or jurisdiction, and it was against good practice, and irregular, and void. Judgment had been given at special term for plaintiff on a demurrer to the answer, from which the defendant appealed. At the last July general term, at Plattsburgh, judgment of reversal was entered by default. At the September general term, at Canton, this default was set aside on motion of plaintiff. The order to that effect did not state that any proof of service of notice of the motion was filed, nor that counsel appeared to oppose. The caption of the order stated the term of holding the court as usual, but in the margin of the order, as certified, was a memorandum, “entered Dec. 20th, 1853.” The defendant’s attorney swore, in his moving affidavit at Ballston, that no notice of that motion was given, and that he never heard of, or had the least intimation of that order until the 20th January, 1854. At the general term at Fonda in January, 1854, judgment was affirmed by default on motion of the plaintiff, upon affidavit of service of notice of argument by mail on the 16th of December last, and the copy of notice filed was dated on the 6th of Dec., 1853. The defendant’s attorney also swore that he never received notice of argument for that term, or knew of the order giving judgment, until the 12th or 13th of January last; and that all these proceedings in relation to both of these orders were a perfect surprise upon him. The special term at Ballston set aside the order purporting to have been entered at Canton, opening the default of plaintiff in July; and also the order for judgment of affirmance entered at Fonda, with \$10 costs. As an excuse for not appearing at Ballston, the plaintiff stated, in his affidavit, that he supposed it the settled practice that such a motion would not be heard at special term. Also, that he was unable to attend the term at Ballston before Wednesday, and was, on Tuesday of that week, attending the Montgomery county court; and that he sent papers to oppose

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to counsel at Ballston, who had informed him that he did not receive them in time. He also stated that the default was taken at Fonda upon filing proof of regular service of notice of argument.

R. S. HALE, *for plaintiff*.

W. GLEASON, *for defendant*.

HAND, Justice. There is no doubt the special term had jurisdiction to open the default. That was the practice before 1847. (2 *How. Sp. T. R.* 32; 1 *Id.* 41, 43, 52.) Although a "special term" is mentioned in the present constitution, (*Art. 6, §§ 6, 9,*) which in this respect is different from the former, yet there is now, as then, but one supreme court. (*Id. Art. 6, § 3.*) This motion is not included among those which, by the rule may be made at general term. (*Rule 27.*) In a recent case, not yet reported, Mr. Justice HARRIS said it was "only when the relief sought affected the adjudication that had been actually made, that it was deemed necessary to apply for such relief at the general term." (Corning agt. Powers, *et al.*, executors, &c., *MSS.*, since reported, *ante*, p. 54.) I think that is the true distinction. Where the motion is made upon the ground of irregularity in obtaining the judgment or order at general term, and the point was not before that court; or if the judgment or order was regular, and the party seeks relief by excusing his default, I see no reason why the application should not be to the special term. It is different where the motion necessarily requires a reconsideration of the adjudication at general term.

The rule entered at Ballston was, therefore, regular, and should not be vacated unless the plaintiff makes sufficient excuse, and the case is one in which an opportunity to be heard might change the result.

The excuse is certainly not very satisfactory. The plaintiff says he was unable to attend, but does not state what prevented his attendance. He was at Fonda attending the county court on Tuesday, and probably heard the result of the motion in time to have reached Ballston before the adjournment. He

Ayres agt. Covill.

sent his papers to counsel, but he does not state when he sent them; nor does it appear, except by hearsay, that they did not arrive in time; nor is it shown they contained any answer to the motion. But the plaintiff swears he supposed the motion would not be heard. Perhaps this may be considered as a mistake of the practice, and if so, he should still be heard, if it appear he has any answer to the motion. The defendant shows that the default at the July general term was duly entered; and I think it should not have been opened without notice of motion for that purpose, and that the order to that effect was inadvertently granted. But as it was done at general term, it is not probable that order would have been vacated by the special term had there been objection.

The plaintiff was clearly irregular in taking judgment of affirmance by default at Fonda. The order obtained at Canton in September, opening his default in July, was not entered until the 20th of December, thirteen days before the term; and his notice of argument was dated on the 6th of that month, and served by mail on the 16th. These proceedings on their face are fatally defective. The defendant was not affected by that order until it was entered and served.

Upon the whole, I think these parties had better be put in a way to go on with the suit, without troubling them to make any more motions.

The order of the special term must be modified so as to permit the order granted at Canton to stand; and in all other respects it must be affirmed.

Considering the doubt as to the practice reasonable, I should not have charged the plaintiff with costs, though if the plaintiff had been right, it was safer to appear and oppose. (9 *Wend.* 450.) But his default at Ballston was regularly entered, and he should have given notice of his motion at Canton; and he has not been charged with the costs of that motion, or of the July term at Plattsburgh, and I can do no less than charge him with the costs of opposing this motion.

Ordered accordingly.

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